

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF CUMBERLAND)	CASE NO.
FALLS HIGHWAY WATER DISTRICT FOR A)	2022-00437
DEVIATION)	

ORDER

On December 29, 2022, Cumberland Falls Highway Water District (Cumberland Falls Highway District) filed an application requesting a deviation from its tariff.¹ The deviation requested involves Cumberland Falls Highway District's desire to reimburse a developer for installing water lines, when the developer did not comply with all requirements set forth in Cumberland Falls Highway District's tariff. The application included attachments related to a water line extension, Cumberland Falls Highway District's current tariff, and a contract.

Cumberland Falls Highway District responded to two data requests.² The Commission held a hearing on April 20, 2023. On June 28, 2023, counsel for Cumberland Falls Highway District submitted a post-hearing brief on the issues.

The Commission finds that the record is complete, and the matter stands ready for a decision.

¹ This filing was similar in nature to a filing made in Case No. 2022-00365, *Electronic Application of Cumberland Falls Highway District for a Deviation* (Ky. PSC Oct. 28, 2022).

² Cumberland Falls Highway District's Response to Commission Staff's First Request for Information (Staff's First Request) (filed Feb. 9, 2023) and Cumberland Falls Highway District's Response to Commission Staff's Post-Hearing Data Request for Information (Staff's Post-Hearing Request) (filed May 8, 2023).

LEGAL STANDARD

Cumberland Falls Highway District is a utility as defined in KRS 278.010(3)(d). Pursuant to KRS 278.040(2), the Commission has jurisdiction over the rates and services of utilities within the state. The Commission's regulation of rates and services ensures that utilities furnish adequate, efficient and reasonable service, as required by KRS 278.030(2). KRS 278.040(3) permits the Commission to adopt regulations to implement the provisions of KRS Chapter 278.

Pursuant to KRS 278.010(12) a rate is any charge or other compensation for service rendered or to be rendered by a utility and any rule, practice, or other requirement, or privilege in any way relating to such charge, and any schedule or tariff or part of a schedule or tariff. Additionally, "service" is defined by KRS 278.010(13) as any practice or requirement in any way relating to the service of any utility. Additionally, Cumberland Falls Highway District has in its tariff a contract containing the terms under which a developer will be reimbursed for the construction of water lines. Reimbursing a contractor for the installation of waterlines to a new development is a practice relating to the service of a water utility.

Each utility is required to file with the Commission a schedule of all rates and conditions for service. KRS 278.160 codifies the "filed rate doctrine", which requires a utility to file with the Commission "schedules showing all rates and conditions for service established by it and collected and enforced."³ It further states:

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

³ KRS 278.160(1).

utility for a compensation greater or less than that prescribed in such schedules.⁴

Moreover, KRS 278.170(1) requires that a utility enforce the assessment and collection of rates in a uniform and non-discriminatory manner. Neither equitable considerations nor a utility's negligence may serve as a basis for departing from the filed rate schedules.⁵ Any deviations from the filed rate schedule would encourage disparate treatment, which is inappropriate for a public utility.

BACKGROUND

Cumberland Falls Highway District has a tariff on file with the Commission. As noted in Cumberland Falls Highway District's Tariff,

No employee or individual Commissioner of the District is permitted to make an exception to these Rates, Rules or Regulations. These Rules and Regulations are to be in effect so long as they are not in conflict with the Kentucky Public Service Commission's Rules and Regulations (807 KAR 5:001 - 5:0076 [sic]. The District is subject to all Rules and regulations of the Kentucky Public Service Commission.⁶

The utility has a contract⁷ in its tariff for developers to sign in order to ask for reimbursement from the water district for 50 feet of water line extension for each lot. The utility also has a "Requirements for a Line Extension Contract".⁸ However, in its

⁴ KRS 278.160(2).

⁵ See *Boone County Sand & Gravel Co. v. Owen County Rural Elec. Coop. Corp.*, 779 S.W.2d 944 (Ky Ct. App. 1989).

⁶ Revised Tariff Sheet No. 1.

⁷ Cumberland Falls Highway District, Contract for Extension of Water Main, Tariff PDF page 38.

⁸ Cumberland Falls Highway District, Requirements for a Line Extension Contract, Tariff PDF page 40.

application, Cumberland Falls Highway District asked for the following deviation(s)⁹ for the items as part of the contract contained in the tariff:

1) The contract is to be executed prior to the undertaking of work by any person.

2) A person undertaking work pursuant to the reimbursement contract shall furnish receipts and proof of payment within ten days after the work is completed.

3) The amounts in the contract as tendered were crossed out¹⁰ and corrected to match current nonrecurring fees in other portions of the tariff. “Cumberland Falls Highway Water District Requirements for Line Extension Contract,” dated November 17, 2000, contains a tap on fee of \$578.00 and a usage deposit of \$69.00.¹¹ Tap on fees were amended to \$800.00 via tariff effective January 1, 2015.¹² The deposit fee was amended to \$110 via tariff effective January 1, 2016.¹³ The signed contracts reflect the correct updated amounts; however, the changes were not initialed by any party.¹⁴

According to the application filed with the Commission on December 29, 2022, in November 2021, the developer, Jeffrey Sparks, communicated with Cumberland Falls Highway District about the line extension to a recreational vehicle resort development, “Diamond Acres”. In March 2021, the Cumberland Falls Highway District’s Board of

⁹ Although the tariff’s initial letter only asked for permission to reimburse the contractor contrary to the tariff and the facts in the case, there were other matters that the utility would also need to have requested deviations from as outlined in the paragraph.

¹⁰ Letter at PDF pages 7-9.

¹¹ Cumberland Falls Highway District, Contract for Extension of Water Main, Tariff PDF page 39.

¹² Cumberland Falls Highway District’s Tariff, First Revised Sheet No. 8A.

¹³ Cumberland Falls Highway District’s Tariff, First Revised Sheet No. 4.

¹⁴ Cumberland Falls Highway District, Letter, PDF at 8.

Commissioners (Board) approved the project,¹⁵ and the developer began work on his subdivision, although receipts provided by Jeffrey Sparks contain dates as early as February 2021.¹⁶ At the time, the contract was not signed, even though it had been sent to the developer.¹⁷ In December 2021, the utility realized that the developer had never returned the signed contract. According to the evidence presented at the hearing, the developer did not present his receipts within ten days of the work completion, as directed in the tariff, in each case; however, he did ultimately present his receipts and proof of his payment.¹⁸ The developer signed the contract on December 31, 2021,¹⁹ and brought in receipts and proof of payment upon completion of the project, but not within ten days of work, receipt, and payment.²⁰

In November of 2022, the Board voted 3 to 1 to reimburse the developer pursuant to the contract at a rate of \$9.63 per foot.²¹ However, the sole dissenting vote requested that, before any money was disbursed, the opinion of the Commission was sought.²²

¹⁵ Cumberland Falls Highway District's Board of Commissioners March 15, 2021 filed as Response to Request 2 PDF (filed on Nov. 29, 2022) at unnumbered page 17 of 61 of PDF.

¹⁶ Exhibit_C_Pt_1.pdf (filed Dec. 29, 2022).

¹⁷ Cumberland Falls Highway District's Response to Staff's Post-Hearing Request, Item 1, Exhibit A. The contract was emailed in February of 2021.

¹⁸ Jeffrey Sparks Hearing Video Transcript (HVT) of the April 20, 2023 Hearing 11:54:50-11:55:30.

¹⁹ Exhibit B (filed Dec. 29, 2022); See also: Cumberland Falls Highway District's Application at unnumbered page 2.

²⁰ Jeffrey Sparks HVT of the April 20, 2023 Hearing 11:54:50-11:55:30.

²¹ Cumberland Falls Highway District's Application at unnumbered page 2.

²² Cumberland Falls Highway District's Board minutes dated Sept. 19, 2022.

DISCUSSION AND FINDINGS

Based on the facts and circumstances, the Commission finds that no deviation should be granted from the tariff in this case. The utility's tariff is clear. For a reimbursement to be made pursuant to the contract set out in the tariff, the following conditions shall be met:

- a) Customer shall execute a contract, before any work starts.
- b) Customer shall follow all Division of Water Regulations and the District's regulations.
- c) Customer shall provide the District with the original "Bill of Materials - or Invoices", within 10 days of completion of work, so a true and actual cost of the extension can be made.
- d) All items above shall be completed, or the contract, as signed in item a, is void and no refunds shall be made.²³

Based on the evidence in the record, the Commission finds that there is only substantial evidence that (b) occurred, rendering any contract signed invalid. Secondly, the Commission states that it cannot retroactively grant a deviation from a tariff. The filed rate doctrine exists to ensure fairness and transparency, even if the result is not a popular one. However, this does not necessarily mean that Cumberland Falls Highway District cannot purchase the water infrastructure installed by the developer. As acknowledged by Cumberland Falls Highway District in its brief, at this time, Mr. Sparks owns the waterlines installed to serve Diamond Acres.²⁴

There is also nothing in the applicable statutes, regulations, or Cumberland Falls Highway District's tariff that prevents Cumberland Falls Highway District from negotiating

²³ Cumberland Falls Highway District, Requirements for a Line Extension Contract, Tariff PDF page 40.

²⁴ Cumberland Falls Highway District's Brief (filed June 28, 2023) at 5-6.

and purchasing the installed waterlines from Mr. Sparks. Cumberland Falls Highway District's tariff does not address the purchase of infrastructure from the owner of such infrastructure; it addresses reimbursing a developer the cost of installing the lines.²⁵ If Cumberland Falls Highway District purchases the infrastructure from the owner, it would be done outside the terms in the tariff, not in contradiction of those terms.²⁶ Further, the cost to purchase the lines should be negotiated in good faith and effectuated via a written agreement to be filed with the Commission. The Commission cautions Cumberland Falls Highway District to review KRS 278.300 and as discussed below, encourages the utility to seek competent, knowledgeable guidance as to its duties and obligations regarding indebtedness.

The Commission has grave concerns regarding the management and operation of Cumberland Falls Highway District. Cumberland Falls Highway District did not have the policies and procedures in place to ensure compliance with its tariff and communication between all the parties involved with this construction project. The Chairman of the Board, Johnny Collette, admitted he wasn't familiar with the contract in the tariff.²⁷ However, the Commission notes that Cumberland Falls Highway District has followed its tariff in relation to reimbursement of the cost to install waterlines in the past.²⁸

²⁵ See *also* KRS 74.100 and KRS 74.280.

²⁶ Cumberland Falls Highway District's Tariff, Contract for Extension of Water Main at PDF page 39.

²⁷ Johnny Collette HVT of the April 20, 2023 Hearing at 09:14:00-09:16:00.

²⁸ Cumberland Falls Highway District's Response to Staff's Post-Hearing Request, Item 5. Records of Cumberland Falls Highway District reflect that between 1997 and 2008 the district reimbursed developers for the cost of installing waterlines 36 times. See *also*, Malea Moses HVT of the April 20, 2023 Hearing at 14:29:16-14:30:05, Ms. Moses testified that the last payment made to a developer was made approximately 13 years ago, and that employees of the district had kept records of such payments.

It is not entirely clear why the current Board was so uninformed about Cumberland Falls Highway District's tariff or past procedures, but it is evident that at the time of the hearing, the Board had not adopted the procedures used by Cumberland Falls Highway District in the past regarding the contract for extension of water mains, nor had it adopted new procedures designed to ensure compliance with its tariff in these circumstances.

Mr. Collette initially stated that Ken Taylor, an engineer for Kenvirons, Inc. (Kenvirons) who performed engineering work for the district, would send the contract to the developers, in his role as the developer's engineer.²⁹ Mr. Collette then stated he believed it was the manager's job to send the contract to the developer, but that policy was not written down or conveyed to the manager at the time of these events.³⁰ Even at the hearing after Mr. Collette's testimony, Mike Baird, the manager, said he felt like it should be a Board responsibility to send contracts to developers.³¹ Further, Mr. Baird testified it was his belief that the water lines constructed by Mr. Sparks would become the property of the district automatically one year following construction.³²

Based on the evidence, the lack of communication was further complicated by three employees leaving the office in a month's time, prior to the hearing.³³ Given the length of time these employees had each been employed by the district, it is concerning to the Commission that all three employees would leave the utility at virtually the same

²⁹ Johnny Collette HVT of the April 20, 2023 Hearing at 09:43:00–09:47:00.

³⁰ Johnny Collette HVT of the April 20, 2023 Hearing at 09:47:00–09:56:00.

³¹ Mike Baird HVT of the April 20, 2023 Hearing at 12:39:00–12:41:00.

³² Mike Baird HVT of the April 20, 2023 Hearing at 14:24:00–14:26:08.

³³ Mike Baird HVT of the April 20, 2023 Hearing at 14:06:00–14:06:30.

time.³⁴ The blurry role of Ken Taylor, combined with the lack of communication, lack of procedures in place to ensure compliance with the tariff, and the disarray following the exodus of long-term employees, leaves the appearance that the Board has not given any consideration to who owes it a duty of loyalty or care and under what circumstances that duty is owed. Although, the utility did not require developers to use Ken Taylor as an engineer, Ken Taylor did provide engineering services to Mr. Sparks for this project.³⁵ Ken Taylor also served as engineer for the utility.³⁶ According to Mr. Collette's testimony, he expected Mr. Taylor to take care of this contract.³⁷ However, there does not appear to have been any written documentation of Mr. Taylor's role and responsibility to the Cumberland Falls Highway District in relation to this project, or on any developer-funded project.

The Commission is deeply concerned about the lack of communicated responsibilities, the turnover at Cumberland Falls Highway District's office, as well as the failure to comply with the tariff. During the investigation into the request for a deviation,

³⁴ Malea Moses HVT of the April 20, 2023 Hearing at 14:28:11–14:29:02. The employees had been with the utility for 22 years, 39 years, and 10 years.

³⁵ Ken Taylor HVT of the April 20, 2023 Hearing at 10:14:00–10:16:00. See Exhibit A (filed May 8, 2023).

³⁶ Ken Taylor HVT of the April 20, 2023 Hearing at 10:19:20–10:22:21, Mr. Taylor presented this project to Cumberland Falls Highway District at a board meeting in February 2021 and performed the hydraulic study; Affidavit of Kenneth Taylor (filed May 8, 2023), Mr. Taylor stated he has functioned as Kenvirons project engineer and primary contact person for Cumberland Falls Highway District since 2015. He further stated that he is an employee of Kenvirons, not Cumberland Fall Highway District. See Cumberland Falls Highway District's Response to Staff's First Request, Item 2, minutes from board meetings of the district list Ken Taylor from Environs as an attendee who gave engineering reports to the board routinely in 2020, 2021, and 2022. Additionally, Ken Taylor gave the manager's report to the board at the March 15, 2021 board meeting.

³⁷ Johnny Collette HVT of the April 20, 2023 Hearing at 09:43:00-09:45:00 and 09:49:00-09:56:00.

the Commission became aware of at least two instances³⁸ of more than one leak adjustment per single customer since 2020. Pursuant to Cumberland Falls Highway District's tariff,

...this utility chooses to offer a once in a lifetime leak adjustment to residential customers if:

- a. A leak has been detected on the customer's water line that has resulted in a monthly bill that is at least \$100 more than the customer's average monthly bill as defined below;
- b. The leak has been fixed; and
- c. Only one household is hooked up to the customer's water meter.³⁹

The Commission reiterates that a tariff is on file to ensure transparency and fairness. The tariff is not optional. The utility has the ability to amend its tariff, and should a board believe a particular policy is unduly harsh, the board may take action to address the issue in compliance with 807 KAR 5:011. A utility may amend its tariff, and the Commission encourages Cumberland Falls Highway District to consider amending its tariff if the current schedule of rules, fees, and conditions is not up to date or sufficient to address the needs of the district. The Commission finds that, should it see fit, there is enough evidence in the record to give rise to a separate investigation into the issues discussed above including but not limited to the utility failing to comply with its tariff.

The Commission further, strongly encourages Cumberland Falls Highway District to seek the advice and counsel of experienced, knowledgeable professionals when considering a change to its tariff or when making any other decision of consequence to its ratepayers. The Commission also believes that it would benefit the Board and the

³⁸ Cumberland Falls Highway District's Response to Staff's First Request, Item 15.

³⁹ Original tariff sheet No .23.

manager to attend training on a yearly basis in order to assist Cumberland Falls Highway District in complying with all relevant statutes and administrative regulations.

As noted in the post-hearing brief, the developer owns the water line extension and courts have allowed a developer and a utility to contract for purchase of water lines.⁴⁰ There is nothing in this Order or the tariff that prevents the water district from negotiating with the developer a purchase of the water line extensions. The Commission notes that this entire situation could have easily been avoided had the Cumberland Falls Highway District's Board, manager, and staff been better aware of the water line extension policy in its tariff.

IT IS HEREBY ORDERED that:

1. Cumberland Falls Highway District's request for a deviation is denied.
2. Cumberland Falls Highway District shall file, as post case correspondence noting this case number, any contract, deed of easement, or other finalized agreements acknowledging the utility's ownership of the waterline extension at issue in this case within 30 days of execution of said document(s).
3. The case is closed and shall be removed from the Commission's docket.

⁴⁰ See Cumberland Falls Highway District's post hearing brief citing *Kreamer v. Harmon*, 336 S.W.2d 561 (Ky. 1960).

PUBLIC SERVICE COMMISSION



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ATTEST:



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