COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

SOUTH WILLIAMSON LODGING, INC.	)	
	)	
COMPLAINANT	)	
	)	
VS.	)	CASE NO. 94-066
	)	
	)	
LITTLE PEARL TRUCKING COMPANY, INC.; MOSES LOWE; DENNY MOORE; SOUTHSIDE REAL ESTATE DEVELOPERS, INC.; AND RELIANCE REALTY, INC.	)	
	)	
DEFENDANTS	)	
	)	

O R D E R

On February 14, 1994, South Williamson Lodging, Inc. ("South Williamson Lodging"), formerly Williamson Super 8 Motel, Inc., filed a complaint against Little Pearl Trucking Company, Inc., Moses Lowe, Denny Moore, Southside Real Estate Developers, Inc., and Reliance Realty, Inc. The complaint alleges that Denny Moore is operating as a utility by charging a fee for the use of water and sewer lines that serve property owned by the complainant and requests the Commission to assert jurisdiction over these utility services, establish reasonable rates for the services rendered and require refunds if appropriate.

On March 24, 1994, an answer was filed, over the signature of Denny Moore, alleging that no fees have been collected for the provision of water or sewer service, but acknowledging that fees have been charged for the transmission of water and sewer

services through lines owned by a third party. The answer further alleges that the fees for the transmission services were intended to recover only the costs of constructing and maintaining the lines used to provide that service. Citing Austin v. City of Louisa, Ky., 264 S.W.2d 662 (1954), the answer alleges that one who charges such fees for transmission services is not a utility subject to the jurisdiction of the Commission under KRS Chapter 278.

The case was scheduled for hearing on May 24, 1994. However, the parties jointly moved to continue the hearing generally to allow existing litigation in the Pike Circuit Court to proceed and to allow the parties sufficient time to resolve this dispute informally. The complainant had previously obtained an injunction from the Pike Circuit Court prohibiting Denny Moore from interfering with the complainant's use of the water and sewer lines. The Court also directed the complainant to pay a monthly transmission fee of $600.

On August 26, 1995, the complainant notified the Commission that the Pike Circuit Court case was being held in abeyance and he now wants to pursue before the Commission the issue of whether Mr. Moore is operating as a utility. The Commission then established a procedural schedule providing for extensive discovery and the taking of depositions. An informal conference was held at the Commission's offices on January 25, 1995. After the receipt of additional information, a hearing was rescheduled for August 30, 1995. The parties subsequently requested that the hearing be cancelled and the case be submitted for a decision on the basis of affidavits and briefs. Those documents having been filed, the case now stands submitted.

Based on the evidence of record and being otherwise sufficiently advised, the Commission finds that in 1985 Denny Moore and his wife purchased approximately 10 acres of undeveloped land in South Williamson, Kentucky. Mr. Moore began to develop the property, known as Southside Plaza, by removing existing tipple structures and coal waste, bringing in fill dirt and compacting it on the site, and installing drains to divert surface water. In 1990, Southside Real Estate Developers, Inc., ("Southside Real Estate"), a corporation wholly owned by Mr. Moore, installed water and sewer lines through the ten acre tract.

Southside Real Estate installed over 3,000 feet of water lines, a 4-inch water meter pit, fire hydrants, cut-off valves, and creek crossings at a cost of approximately $50,000. The water lines are used to distribute water within the development and are tied into a water main owned by the Mountain Water District. Southside also constructed over 3,600 feet of sewer lines, installed pumps and upgraded an existing sewage lift station in 1990 at a cost of approximately $100,000. The sewer lines are used to collect sewage within the development and transport it to the municipal sewer system serving Williamson, West Virginia.

The ten acre tract was acquired by Little Pearl Trucking, Inc. ("Little Pearl") at a bank foreclosure sale in December 1990. Little Pearl, a Kentucky corporation owned by Moses Lowe and Lee Thacker, subsequently sold two one-acre tracts; one to the complainant for the construction of a 59-unit motel, the other to the Lark Group for the construction of a grocery store.

In January 1993, at about the time of the closing on its property, the complainant first became aware that it would have to pay a monthly water and sewer transmission fee for the right to use the water and sewer lines owned by Southside Real Estate.[1] For water distribution service Southside Real Estate charges the complainant $314.47 per month based on a formula of $5.33 per room times 59 rooms. Southside Real Estate indicated that since each room in the motel was rented and taxed individually, the water distribution fee should be based on the number of rooms. The grocery store is charged a flat rate of $85 per month. For the use of its sewer collection lines, Southside Real Estate charges the complainant $885 per month based on a formula of $15 per room times 59 rooms. The grocery store is charged a flat rate of $255 per month.

When asked to explain how the rates for the use of both the water and sewer lines were calculated, Mr. Moore stated in a December 29, 1994 deposition that:

> There were no mathematical equations. We just determined, you know, we have invested this much in the system. We have got this much responsibility to the people using it, to the city of Williamson. It is going to get older. We have to monitor it daily to make sure that the system doesn't come down and back up into the motel. Those are the things that have to be considered, and that's the way we arrived at it.

Further, he explained that consideration was given to the rates charged by a nearby shopping mall to its tenants for similar services. When requested to provide a copy of the workpapers supporting the rate calculations, Mr. Moore stated that none existed and

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[1] There appears to be a legal issue of whether the water and sewer lines are fixtures attached to the property, in which case their ownership would pass with the title to the real estate. However, since the Commission's jurisdiction is limited to the regulation of utilities, any challenge to Southside Real Estate's claim of ownership would have to be in the Pike Circuit Court.

he was unable to reconstruct the numbers. He did admit, however, that a profit margin was included in his rate although he was also unable to explain its calculation.

Assuming that Southside Real Estate owns all water distribution lines and sewer collection lines in the 10 acre development, these lines constitute facilities under KRS 278.010(9) and they are used for or in connection with the distribution of water and the treatment of sewage under KRS 278.010(3)(d) and (f). This conclusion is in accord with the recent opinion in Boone County Water and Sewer District v. Public Service Commission, et al., 42 K.L.S. 9, p. 1 (9/1/95), where the Court held that the Public Service Commission has jurisdiction over sewer collection lines. "[W]hile treatment and collection may not be the same thing, collection of sewage is clearly an operation 'in connection with' the treatment of sewage." Boone County at 3.

Southside Real Estate also meets the statutory criteria of a utility by offering its services to the public for compensation. Southside Real Estate holds itself out to provide water distribution and sewer collection services to all members of the public that now or in the future own property within the 10 acre development. It is immaterial that it has a limited service territory and limited capacity facilities. North Carolina Utilities Commission v. Carolina Tel. and Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966). The charging of rates for the distribution and collection services results in the receipt of compensation by Southside Real Estate. It is also immaterial whether Southside Real Estate is actually recovering a profit through the rates charged since many regulated utilities operate on a non-profit basis. The reimbursement of expenses is sufficient to constitute compensation. See Schenley Distillers Corp. v. United States, 61 F.Supp.

981, 987 (D. Del. 1945). In addition, it is not unusual for utilities built to serve very small developments to be unprofitable until the development approaches full capacity due to the relatively high capital investment in utility facilities.[2]

Southside Real Estate argues that it owns and operates private water and sewer lines and, therefore, is exempt from the Commission's jurisdiction under the rule established in Austin v. City of Louisa, supra. In that case three property owners constructed a water line at a cost of $1,500 to provide their own residences with water from the City of Louisa's municipal system. Over 20 neighbors were subsequently allowed to tap onto the water line upon paying a one time charge of $100 and executing a contract to hold the three builders harmless for loss of service and agreeing to share the maintenance expense.

The Austins tapped into the water line indirectly by connecting through a neighbor's tap. After initially refusing to pay anything for the water line, the Austins later agreed to pay the $100 fee but refused to sign the contract. The three builders then placed a valve in the neighbor's tap, cutting off the Austins' water supply. In dismissing the Austins' claim that the three builders were operating a public utility, the Court held that the recovery of expenses by the owners of the water line who were also water

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[2] While Southside Real Estate has submitted an analysis to show that its existing rates for its two customers produces no profit, the Commission can express no opinion on the accuracy of that analysis until Southside Real Estate files an application to establish initial rates and demonstrates that it expenses are reasonable and its capital investment is not recovered through the sale of the property.

customers of the municipal system did not constitute the distribution of water for compensation under KRS Chapter 278.

The Commission finds that the facts in Austin are clearly distinguishable from those in the pending complaint. Here, Southside Real Estate did not construct the water or sewer lines to serve its own property. Rather, when Southside Real Estate constructed the water and sewer lines in 1990, it owned no property within the 10 acres and undertook the construction solely to enhance the resale value of the 10 acre commercial development owned by its sole shareholder, Denny Moore.

In addition, the neighbors in the Austin case had the option to tap into the water line to receive city water or continue to utilize their existing water supply. Here, the one acre tracts sold to the complainant and the grocery store had only one source for water service and one source for sewer service. The properties were sold with the understanding that such services would be obtained through the existing lines installed by Southside Real Estate. Unlike the Austin case, where the owners of the water line stated in writing that they would not be responsible for any loss of service, here Mr. Moore has acknowledged that having advised the property owners that water and sewer lines are available, there is a responsibility to ensure that the systems operate properly. This is the basic tenet of a public utility system, not of non-utility, private lines.

Southside Real Estate also claims that it should not be under the Commission's jurisdiction because the services it provides are no different from those provided by two nearby shopping malls, neither of which are regulated as utilities. While the Commission had no prior knowledge of these malls and the evidentiary record here is incomplete, it

appears that the malls built lines to serve their own shopping centers and they continue to serve themselves. Thus, there is no service to the public.

The fact that property owners adjoining the malls have been allowed to tap onto the malls' lines is merely incidental to the malls' serving themselves, a situation similar to that in the Austin case. Even charging tenants in the shopping centers for water and sewer services does not constitute serving the public because the shopping center is still only serving its own property and the provision of such services is incidental to the landlord-tenant relationship. See Public Service Commission of Maryland v. Howard Research and Development Corp., 271 Md. 141, 314 A.2d 682 (1974). However, should there cease to be the commonality of ownership of the mall and the water and sewer lines, the owner of the lines would be subject to Commission jurisdiction as is Southside Real Estate.[3]

Southside Real Estate, being a utility as defined in KRS 278.010, can charge no rate for service rendered except that set forth in its filed tariffs. KRS 278.160. Since it has no tariffs on file with the Commission, Southside Real Estate must immediately cease charging and collecting any rates, tolls or charges for services rendered. Should it desire to establish an initial rate for water distribution and sewage collection services, a rate application will have to be filed.

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[3] The Commission also notes that it continually discovers "new" utilities that have existed for years without our knowledge or regulation. Should subsequent information indicate that the malls are utilities under the definitions in KRS 278.010, jurisdiction will be asserted over those systems.

Furthermore, the collection to date of any charges for utility service was illegal in violation of KRS 278.160. Southside Real Estate, having had no legal right to collect from its customers any rates for service, should be required to refund all amounts collected to date. Only by making such refunds can the customers be made whole. Considering the amounts involved, a reasonable period of time to make the refunds is three years. Within 20 days Southside Real Estate should file schedules showing by month and year the amounts collected from each customer, separately identifying the portions attributable to water service and sewer service.

IT IS THEREFORE ORDERED that:

1. Southside Real Estate is a utility as defined in KRS 278.010.

2. Southside Real Estate has not been authorized to charge or collect any rates for the water distribution and sewer collection services being rendered and shall immediately cease charging or collecting any rates for such services.

3. Southside Real Estate shall neither charge nor collect any rates for utility services rendered until it files an application for and receives Commission approval of initial rates.

4. Within 20 days of the date of this Order, Southside Real Estate shall file schedules showing by month and year the amount collected from each customer, separately identifying amounts attributable to water and sewer service. The complainant shall have 10 days to file comments on the schedules, after which the Commission shall direct the payment of refunds.

Done at Frankfort, Kentucky, this 10th day of July, 1996.

PUBLIC SERVICE COMMISSION

Linda K Breathitt
Chairman

Edward J. Holmes
Vice Chairman

Robert M. Davis
Commissioner

ATTEST:

Don Mills
Executive Director