

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

| | | |
|------------------------------|---|-----------------|
| LOUIE ENCIL DALTON |) | |
| |) | |
| COMPLAINANT |) | |
| |) | |
| v. |) | CASE NO. 97-303 |
| |) | |
| WESTERN PULASKI COUNTY WATER |) | |
| DISTRICT |) | |
| |) | |
| DEFENDANT |) | |

O R D E R

Complainant brings a formal complaint against Western Pulaski County Water District ("Western Pulaski") for reimbursement of water main extension construction costs totaling \$6,978.65. Arguing that the complaint is barred by KRS 413.120(2), Western Pulaski moves for dismissal. We grant Western Pulaski's motion in part, dismiss Complainant's claim for reimbursement of certain construction costs, and direct Western Pulaski to reimburse Complainant \$1,454.75 for the remaining construction costs.

PROCEDURE

On June 27, 1997, Louie Encil Dalton ("Dalton") filed a formal complaint against Western Pulaski for reimbursement of the cost of constructing 3 water main extensions. Denying Dalton's claim to any reimbursement, Western Pulaski filed its Answer on October 20, 1997. On January 16, 1998, Western Pulaski, contending that the statute of limitations barred the complaint, moved for dismissal. On the same day, the Commission held an evidentiary hearing in this case on January 16, 1998 at which Dalton and Morris Vaughn testified.

STATEMENT OF THE CASE

Western Pulaski, a water district organized pursuant to KRS Chapter 74, provides water service to the public for compensation in the western portion of Pulaski County, Kentucky. Created from the merger of Oak Hill Water Association, Pleasant Hill Water District ("Pleasant Hill"), and Pulaski County Water District No. 2,¹ it serves approximately 5,577 customers.

In late 1988, Dalton contacted Pleasant Hill and sought its approval for a water main extension to serve a mobile home park that he was developing.² He subsequently met with Morris Vaughn, Pleasant Hill's field manager, and discussed the proposed main extension. Vaughn then met with and presented Complainant's proposal to Pleasant Hill's Board of Commissioners ("the Board"). After receiving the Board's approval, Vaughn advised Dalton that the Board had approved the proposed main extension with modifications. He told Dalton to contact Don Molden Multiple Services, Inc. ("Don Molden"), a construction firm, to perform the construction.

¹ See Case No. 9967, The Proposed Merger of Barnesburg Water Association, Bronston Water Association, Elihu-Rush Branch Water Association, Nelson Valley Water Association, Oak Hill Water Association, Pleasant Hill Water District, Pulaski County Water District No. 1, Pulaski County Water District No. 2, and Tateville Water Association (February 22, 1988) at 6.

² Complainant contacted the Somerset, Kentucky office of South Kentucky Rural Electric Cooperative Corporation ("South Kentucky RECC"). At that time, South Kentucky RECC provided billing and collection services for Pleasant Hill. South Kentucky RECC employees referred the Complainant to Morris Vaughn. Transcript ("Tr.") at 53-54, 78.

In January 1989, Dalton retained Don Molden to construct 380-feet of 6-inch water main to provide water service to 4031 Slate Branch Road in Somerset, Kentucky.³ This main extension ran along a private road that Dalton owned and led to a mobile home park that Dalton operated.⁴ Total cost of this extension was \$4,291.⁵ Don Molden completed construction of this main extension on January 21, 1989. Within a year of this main's completion, approximately 7 connections were made to the line.⁶ No new connections have been made since then.

In May 1989, Dalton added 258 feet of 4-inch water main to the original extension at a cost of \$1,233. Don Molden also built this main extension. By December 1989, 10 customers had connected to this extension.⁷ As with the earlier main extension, Pleasant Hill directly serves these customers and measures each customer's water usage through an individual meter.⁸

Following the same procedure, Dalton in July 1991 obtained the Board's approval to construct 250 feet of 6-inch water main to extend water service to 2303 Slate Branch Road. This extension, which Don Molden also constructed, ran along a private road to

³ Commission Staff Exhibit 1.

⁴ Tr. at 27.

⁵ Id. at 28; Commission Staff Exhibit 1.

⁶ Tr. at 29.

⁷ At the hearing, Dalton presented cancelled checks for the tap fees paid to Pleasant Hill for meters connected to these main extensions. Between April 26, 1989 and December 1, 1989, Dalton paid \$5,100 in tap fees. Since Pleasant Hill assessed a tap fee of \$300, the Commission assumes that 17 new customers connected to these main extensions.

⁸ Id. at 57.

another mobile home park. Construction was completed on July 24, 1991 at a total cost of \$1,454.75. Between the completion of construction and April 3, 1992, 11 new customers connected to this main extension.⁹ No new customers have connected since then.¹⁰

DISCUSSION

Complainant's Right to Reimbursement

Dalton contends that Administrative Regulation 807 KAR 5:066, Section 11, requires Western Pulaski to reimburse him for the cost of the main extensions. This regulation provides:

An applicant desiring an extension to a proposed real estate subdivision may be required to pay the entire cost of the extension. Each year, for a refund period of not less than ten (10) years, the utility shall refund to the applicant who paid for the extension a sum equal to the cost of fifty (50) feet of the extension installed for each new customer connected during the year whose service line is directly connected to the extension installed by the developer, and not to extensions or laterals therefrom. Total amount refunded shall not exceed the amount paid to the utility. No refund shall be made after the refund period ends.¹¹

807 KAR 5:066, Section 11(3).

⁹ Commission Staff Exhibit 5. Tr. at 23, 37.

¹⁰ Dalton was unaware of any right to reimbursement until 1997 when he financed a fourth main extension. After the completion of this main extension and connection of several customers, Western Pulaski reimbursed him for a portion of the main extension costs. Realizing that he might be entitled to reimbursement for the earlier extensions, he brought his complaint. Tr. at 23.

¹¹ At the time Complainant made his extensions, this regulation was codified as Administrative Regulation 807 KAR 5:066, Section 12(3). On June 7, 1992, Administrative Regulation 807 KAR 5:066 was modified and this section was renumbered. No change to the text of this section, however, was made. See 18 Ky.Admin.R. 1968; 3388 (1992).

Disputing Dalton's right to reimbursement, Western Pulaski argues that the extensions were made without Pleasant Hill's consent and were merely private arrangements between Dalton and Don Molden. It notes Dalton's lack of any written agreement with Pleasant Hill and the absence of any reference to Dalton's main extensions in the Board's records. Western Pulaski further points out that Dalton never dealt with the Board of Commissioners, appeared at any Board meeting, or paid any monies to Pleasant Hill for the main extensions.

The record, however, contains ample evidence to support Dalton's contentions and rebut Western Pulaski's arguments. Morris Vaughn, who was Pleasant Hill's only employee from 1987 until 1996 and who was responsible for the water district's day-to-day operations during that period, testified that requests for main extensions were normally presented to him or a Board member.¹² He further testified that the Board normally decided these requests at its meetings and directly notified Don Molden of its decision.¹³

Vaughn also testified that Pleasant Hill had a close working relationship with Don Molden.¹⁴ Don Molden set all of the water district's meters, repaired and maintained its water lines, and constructed every main extension. Vaughn further testified that Don Molden took no action related to a main extension or meter setting without express Board approval.¹⁵

¹² Tr. at 78, 80, and 88.

¹³ Id. at 80.

¹⁴ Id. at 91.

¹⁵ Id. at 79 and 96.

Vaughn's testimony corroborates Dalton's statements on several key points. Vaughn testified that Dalton contacted him to request the main extensions, that he presented these requests to the Board, and that the Board had approved them.¹⁶ He also stated that Dalton's requests for main extensions were among the first considered by the Board¹⁷ and were made when the Board had yet to develop any written policy regarding main extensions and was not overly concerned with documenting its approval of such requests.¹⁸

The Commission finds further support for Dalton's claims in the sizing of the main extensions. Dalton testified that, while he preferred the use of 3-inch and 4-inch main, the Board insisted upon larger sized piping.¹⁹ In two of the three main extensions, 6-inch piping was used.²⁰ In the other extension, 4-inch main was installed. Such sizing is consistent with normal water utility practice to ensure proper pressure and provide for future growth,

¹⁶ Id. at 76

¹⁷ Id. at 89.

¹⁸ Id. at 93-94.

¹⁹ Dalton testified that he felt 3-inch mains would have been adequate and that 6-inch mains might pose some safety concerns:

I felt three inch would be sufficient, I would argue that they go into neighborhoods and service like 100 homes on a three inch main. And all I'm going to have would be like 17 meters in only 500 or 600 feet and it running down hill on a steep incline. And that if this line was to bust it would blow a mobile home into, that a three inch line would be sufficient. I voiced this to Mr. Neikirk, Chairman of the District. I voiced my opinion but they make you do whatever they want.

Id. at 62.

²⁰ Id. at 20, 62.

but not with Dalton's limited needs.²¹ If the water mains were "private lines," the same level of service could easily have been achieved at much lower cost with smaller sized water mains.

The Commission further finds that Pleasant Hill's conduct suggests its knowledge and approval of the main extensions. It set meters for each connection to these extensions, charged a tapping fee for each meter installation, and directly billed each customer. By these actions, it assumed responsibility for the operation and maintenance of those extensions. See Administrative Regulation 807 KAR 5:066, Section 12. It is inconceivable that the water district would have taken these actions if the main extensions were "private" and without its consent.

Based upon our review of the record, the Commission finds that Dalton constructed the main extensions with Pleasant Hill's knowledge and approval and that Administrative

²¹ On this issue, Dalton testified:

Q Is there any reason for the difference in the two pipe sizes?

A I would complain and Mr. Neikirk, Chairman of the District, he insisted that that is what you use for further expansion--like if the next door neighbor wanted to run it or the next farm--and then they ran it six inch until they get to the fire hydrant. And then after that they could reduce it down, it was going to be like eight or nine more meters on it. So, I run six to the fire hydrant and then reduced it down to four and run it the other 258 foot.

Id. at 59.

Regulation 807 KAR 5:066, Section 11(3), is applicable and requires Western Pulaski, as Pleasant Hill's successor in interest, to reimburse \$6,639.25 to the Complainant.²²

²² Reimbursement owed to Complainant is calculated as follows:

January 1989 Extension:

Total cost: \$4,291

Total length of extension: 380 feet

Average Cost Per Foot: \$11.29 ($\$4,291 \div 380$ feet)

Reimbursement for each connection: \$564.50 (50 feet x \$11.29)

Total Connections: 7

Total Reimbursement: \$3951.50 (7 x \$564.50)

May 1989 Extension:

Total cost: \$1,233

Total length of extension: 250 feet

Average Cost Per Foot: \$4.78 ($\$1,233 \div 258$ feet)

Reimbursement for each connection: \$239 (50 feet x \$4.78)

Total Connections: 10

Total Reimbursement: \$1,233 (10 x \$239) (Reimbursement cannot exceed total cost of extension.)

July 1991 Extension:

Total cost: \$1,454.75

Total length of extension: 250 feet

Average Cost Per Foot: \$5.82 ($\$1,454.75 \div 250$ feet)

Reimbursement for each connection: \$291 (50 feet x \$5.82)

Total Connections: 11

Total Reimbursement: \$1,454.75 (11 x \$291) (Reimbursement cannot exceed total cost of extension.)

Total Reimbursement for All Extensions: \$6,639.25

Statute of Limitations

Western Pulaski argues that KRS 413.120²³ bars Dalton's claim to reimbursement. Noting that Administrative Regulation 807 KAR 5:066, Section 11, is promulgated pursuant to KRS 278.280²⁴ and that this statute has no express time limitations, it asserts that KRS 413.120 governs Dalton's claim for reimbursement. It further asserts that, as KRS 413.120 required Dalton to bring his complaint for reimbursement within 5 years of payment of the main extension costs and, as he paid the last of these costs on July 24, 1991, his claim for reimbursement is time-barred.

The Commission's review of KRS 413.120(2) indicates that Dalton's action is subject to the 5-year time limitation. Clearly, Western Pulaski's liability for reimbursement and Complainant's entitlement to reimbursement are based upon KRS 278.280(2). While extensive precedent exists for the proposition that a statute of limitations applies only to judicial tribunals, the Kentucky Court of Appeals has recently rejected this proposition and

²³ The following actions shall be commenced within five years after the cause of action accrued:

...

An action upon a liability created by statute, when no other time is fixed by the statute creating the liability.

KRS 413.120(2).

²⁴ The Commission shall prescribe rules for the performance of any service or the furnishing of any commodity of the character furnished or supplied by the utility, and, on proper demand and tender of rates, the utility shall furnish the commodity or render the service within the time and upon the conditions provided in the rules.

KRS 278.280(2).

held that it also applies to "administrative boards conducting quasi-judicial proceedings but operating without any express limitations period." Commonwealth, Natural Resources and Environmental Protection Cabinet v. Kentucky Insurance Guaranty Association, No. 95-CA-0746-MR, 1997 WL 283378, at **4 (Ky. App. May 30, 1997).²⁵

Dalton's cause of action did not accrue when he paid the main extension costs. "A cause of action accrues when a party has the right and capacity to sue." Lexington-Fayette Urban County Government v. Abney, Ky.App., 748 S.W.2d 376, 378 (1988). Administrative Regulation 807 KAR 5:066, Section 11(3), does not impose any liability upon a water utility until new customers are connected to the privately financed main extension. Moreover, it requires reimbursements not upon the connection of a new customer, but upon the next anniversary date of the the main extension's completion.²⁶ Any liability, and hence any cause of action for failure to reimburse, begins on the anniversary of completion of the

²⁵ For precedent supporting the contrary position, see Metts v. City of Frankfort, Ky. App., 665 S.W.2d 318, 319 (1984); Ocean Hill Joint Venture v. North Carolina Dept. of Environment, Health and Natural Resources, 426 S.E.2d 274 (N.C. 1993); Little Company of Mary Hospital v. Belshe, 61 Cal.Rptr.2d 626 (Cal.App. 1997). See also Pathman Construction Co. v. Knox County Hospital Ass'n, 326 N.E.2d 844, 854 (Ind. App. 1975) ("The term 'action' in its usual sense, at least its usual legal sense, means a suit brought in court, a formal complaint within the jurisdiction of a court of law."); World Cup Ski Shop, Inc. v. City of Ketchum, 796 P.2d 171, 172 (Idaho Ct. App. 1990) ("[A] 'civil action' is an action commenced by filing a complaint with a court."). But see Sahu v. Iowa Bd. of Medical Examiners, 537 N.W.2d 674 (Iowa 1995); 2 Am.Jur.2d Administrative Law §272 (1994).

²⁶ Each year, for a refund period of not less than ten (10) years, the utility shall refund to the applicant who paid for the extension a sum equal to the cost of fifty (50) feet of the extension installed for each new customer connected during the year whose service line is directly connected to the extension installed by the developer, and not to extensions or laterals therefrom.

807 KAR 5:066, Section 11(3) (emphasis added).

water main extension's construction. If new connections are made in a later year, a new cause of action will accrue on the anniversary date in that year.

Based upon the foregoing, the Commission finds that KRS 413.120(2) bars Dalton's claims for reimbursement for main extensions constructed in 1989. In the case of those extensions, all new connections were made within a year of the extension's construction. Dalton's action for reimbursement, therefore, accrued in 1990 and had to commence on or before before May 31, 1995.

The Commission further finds that KRS 413.120(2) does not bar Complainant's complaint for reimbursement for the third main extension. Construction of this extension was completed on July 24, 1991 and all connections were made by December 1991. Dalton's action for reimbursement accrued on July 24, 1992 - the first anniversary of construction completion. As Dalton filed his complaint on June 27, 1997, it was timely filed.

CONCLUSION

Based upon the foregoing, the Commission HEREBY ORDERS that:

1. Defendant's Motion to Dismiss is granted in part and denied in part.
2. Dalton's claims for reimbursement for water main extensions to 4031 Slate Branch Road in Somerset, Kentucky are denied.
3. Within 30 days of the date of this Order, Western Pulaski shall reimburse \$1,454.75 to Dalton for the cost of the water main extension to 2303 Slate Branch Road, Somerset, Kentucky.

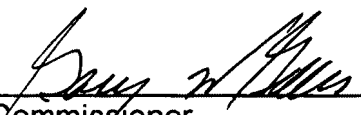
4. Should any additional connections be made to the water main extensions in question, Western Pulaski shall make reimbursements to Dalton consistent with Administrative Regulation 807 KAR 5:066, Section 11(3).

Done at Frankfort, Kentucky, this 11th day of June, 1998.

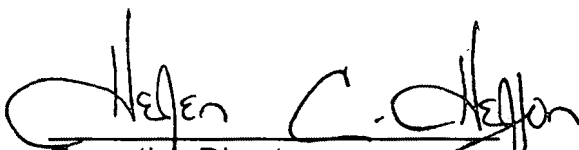
PUBLIC SERVICE COMMISSION


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Executive Director