

in the water district's filed rate schedules. It further alleged that Kentucky Turnpike's actions constituted unlawful and unreasonable discrimination and violated KRS 278.170.

In its Answer, Kentucky Turnpike admitted conditioning its approval of the proposed extensions upon payment of an impact fee, but asserted that it uniformly assessed this fee and that the fee was reasonable and necessary. It further asserted that its denial of service to Burke Realty Company was lawful as the Complainant had failed to meet reasonable conditions of service for water main extensions.

John Miller and Richard Haarman subsequently intervened in this proceeding. Both alleged that Kentucky Turnpike unlawfully required the payment of impact fees as a condition for the connection of their proposed subdivision developments along Kentucky Highway 480 to the Cedar Grove Road Transmission Main.¹

After the parties conducted extensive discovery, the Commission held a public hearing in this matter on April 1, 1998. The following persons testified: Gerald P. Burke, president of Burke Realty Company; John Miller; Richard Haarman; Vicki Ray, manager of the Drinking Water Branch of the Kentucky Division of Water; Elmer Mills, Dan H. Thibodeaux, George R. Miller, current members of Kentucky Turnpike's Board of Commissioners; Karen C. Smith, a former member of Kentucky Turnpike's Board of Commissioners; Raymond Abell, Kentucky Turnpike's District Manager; and David G. Derrick, owner of Derrick Engineering, Inc. On May 7, 1998, following the submission of written briefs, this matter was submitted for decision.

¹ The Commission also permitted Charles R. Smith to intervene in this proceeding.

STATEMENT OF THE CASE

Kentucky Turnpike provides water service to the unincorporated areas of Bullitt County, Kentucky. It is organized into two divisions. Division I, which serves northern Bullitt County, was formed in 1968. The Louisville Water Company (LWC) operates Division I s facilities under a lease agreement. Division II, which comprises the remnants of Salt River Water District that voluntarily merged with Kentucky Turnpike in 1992,² serves central and south-central Bullitt County. Kentucky Turnpike owns, operates, and manages Division II s facilities.

In 1996 Kentucky Turnpike began constructing the Cedar Grove Road Transmission Main. This main, which is 10 inches in diameter and 7.5 miles in length, runs along Kentucky Highway 480 and is intended to provide water service to the Division II service area and to North Nelson County Water District. It cost approximately \$1.228 million. Although the project represented a major construction project, Kentucky Turnpike did not apply for a Certificate of Public Convenience and Necessity for its construction.

To recover the cost of the Cedar Grove Road Transmission Main, Kentucky Turnpike assesses two fees: a customer participation fee and a developer participation/contract fee.³ Prior to the transmission main s construction, the water district established a customer participation fee for each prospective customer who

² Salt River Water District, Case No. 92-169 (Ky. P.S.C. Feb. 10, 1993).

³ Throughout the record, the parties have also referred to this fee as an impact fee or developer s fee. The minutes of the June 19, 1997 meeting of the Kentucky Turnpike s Board of Commissioners in which this fee was approved refer to the fee as a developer participation/contract fee. See Defendant s Responses to Complainant s Request for Production of Documents, Item 3. To avoid confusion, the Commission will throughout this Order refer to this fee as the developer s fee.

connects directly to the main. The record is unclear as to how Kentucky Turnpike determined the level of this fee. Kentucky Turnpike did not publish this fee in its filed rate schedule or seek Commission approval of it as part of any alternative water main extension arrangement.

On June 19, 1997, Kentucky Turnpike's Board of Commissioners approved a developer's fee of \$1,800 for each connection made to any main within a subdivision development connecting to the Cedar Grove Road Transmission Main.⁴ This developer's fee had two components. The first component consisted of a \$500 fee to finance future upgrades of old supply lines, pumps and reservoirs within Division II.⁵ The other was a \$1,300 fee to retire or service the debt on the Cedar Grove Road Transmission Main.⁶ As with its customer participation fee, Kentucky Turnpike did not revise its filed rate schedules to reflect this new fee.

In April 1997 John Miller and Richard Haarman applied to Kentucky Turnpike for approval of water main extensions to their proposed subdivision developments. Miller and Haarman proposed to construct water mains that would connect to the Cedar Grove Transmission Main and then donate these mains to Kentucky Turnpike. Kentucky Turnpike approved both proposed developments on the condition that each execute a main extension agreement with the water district. Kentucky Turnpike subsequently presented both developers with a main extension agreement that required

⁴ See Defendant's Responses to Complainant's Request for Production of Documents, Item 3.

⁵ Id.

⁶ Id.

the payment of developer s fees.⁷ When both refused to execute the required agreements, the water district refused to permit any main connections to the Cedar Grove Road Transmission Main.⁸

Burke Realty Company is a Kentucky corporation that owns property within Bullitt County, Kentucky along Kentucky Highway 480. Gerald P. Burke, Sr. is Burke Realty Company s president. From August 1976 until January 1995, he served as a member of Kentucky Turnpike s Board of Commissioners. From January 1995 until May 1997, he served as manager of the water district.

On June 19, 1997, Burke Realty Company presented plans to Kentucky Turnpike for a water main extension to connect its proposed Serene Meadows Subdivision to the Cedar Grove Road Transmission Main. It proposed to construct the water distribution main and then transfer ownership to Kentucky Turnpike. Kentucky Turnpike approved the proposed extension subject to the following conditions: (1) payment of a developer s fee of \$1,800 for each subdivision lot; (2) dedication of an easement to Kentucky Turnpike to permit the water district to loop its water lines within the proposed subdivision; (3) dedication of an easement for all donated water mains; and (4) the use of non-clockwise piping threads on fire hydrants within the proposed subdivision.

⁷ Defendant s Responses to Complainant s Request for Production of Documents, Item 22.

⁸ Miller and Haarman eventually executed agreements with the water district that required the payment of developers fees subject to the resolution of their complaint. Kentucky Turnpike agreed to hold the funds in an escrow account pending resolution of their complaint. See Letter from Jason P. Thomas to Gerald Wuetcher of October 30, 1998.

On September 9, 1997, Burke Realty requested that Kentucky Turnpike accept ownership of a constructed 6-inch water main that was intended to serve Dreams Ends Lane and would connect directly to the Cedar Grove Road Transmission Main. Contending that the main's size was too large, Kentucky Turnpike rejected the proposal. Noting that only two residences were located on Dreams End Lane, it stated that the water flow through the 6-inch main would not be adequate to ensure compliance with state drinking water standards. Kentucky Turnpike offered to provide service under the following conditions: (1) Burke Realty pay a customer participation fee of \$2,550 for each lot on Dreams End Lane that received water service; (2) Burke Realty publicly dedicate Dreams End Lane or grant a dedicated public utility easement; (3) Burke Realty reimburse Kentucky Turnpike for its engineering costs related to the design of the Dreams End Lane main extension; (4) Burke Realty provide a copy of the as-built drawings of the 6-inch main; and (5) Burke Realty build and connect two parallel water lines to the Cedar Grove Road Transmission Main to directly serve the residences.⁹

Burke Realty objected to certain of the water district's conditions attached to each extension and refused to comply. Kentucky Turnpike has refused to approve the proposed main extensions or permit any connection to the Cedar Grove Road Transmission Main.

⁹ On December 4, 1997, while this case was awaiting hearing, Kentucky Turnpike imposed a moratorium on service to new subdivisions. Burke Realty argues that the moratorium violated KRS 278.160. Kentucky Turnpike asserts that the moratorium was necessary because of severe hydrology problems within its water distribution system. As Kentucky Turnpike lifted the moratorium on August 4, 1998 and no longer conditions service to the proposed subdivisions on the lifting of the moratorium, the issues surrounding it are moot and will not be addressed in this Order.

DISCUSSION

The Filed Rate Doctrine

The principal issue before the Commission is whether Kentucky Turnpike's assessment of certain fees and its imposition of certain conditions of service for water main extensions violate KRS 278.160. Previously discussing the significance of KRS 278.160, we declared:

KRS 278.160 codifies the "filed rate doctrine." It requires a utility to file with the Commission "schedules showing all rates and conditions for service established by it and collected or enforced." KRS 278.160(1). 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 utility for a compensation greater or less than that prescribed in such schedules.

KRS 278.160(2).

Interpreting similarly worded statutes from other jurisdictions, courts have held that utilities must strictly adhere to their published rate schedules and may not, either by agreement or conduct, depart from them. Corp. DeGestion Ste-Foy v. Florida Power and Light Co., 385 So.2d 124 (Fla. Dist. Ct. App. 1980). A similar rule applies to the published rate schedules of common carriers. Louisville & N.R.Co. v. Central Iron & Coal Co., 265 U.S. 59 (1924); Sallee Horse Vans, Inc. v. Pessin, Ky.App., 763 S.W.2d 149 (1988).

The primary effect of KRS 278.160 is to bestow upon a utility's filed rate schedule the status of law. The rate when published becomes established by law. It can be varied only by law, and not by act of the parties. The regulation . . . of . . . rates takes that subject out of the realm of ordinary contract in some respects, and places it upon the rigidity of a quasi-statutory enactment. New York N.H. & H.R. Co. v. York and Whitney, 102 N.E. 366, 368 (Mass. 1913). While a utility may file or publish new rate schedules to change its rates pursuant to KRS 278.180, it lacks the legal authority to deviate from its filed rate schedule. It can claim no rate as a legal

right that is other than the filed rate. Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 251 (1951).

This inflexibility is, in part, the result of a strong public policy to ensure rate uniformity, to "have but one rate, open to all alike, and from which there could be no departure." Boston & M.R.R. v. Hooker, 233 U.S. 97, 112 (1914). Equality among customers cannot be maintained if enforcement of filed rate schedules is relaxed. For this reason, neither equitable considerations nor a utility's negligence may serve as a basis for departing from filed rate schedules. Boone County Sand & Gravel Co. v. Owen County Rural Elec. Co-op. Corp., Ky.App., 779 S.W.2d 224 (1989). To do so would increase the potential for fraud, corruption, and rate discrimination.

The doctrine is also intended to preserve the Commission's "primary jurisdiction over reasonableness of rates and . . . ensure that regulated companies charge only those rates of which the agency has been made cognizant." City of Cleveland, Ohio v. Fed. Power Comm'n, 525 F.2d 845, 854 (D.C. Cir. 1976). The assessment of rates which the Commission has neither seen nor reviewed represents a serious challenge to the Commission's authority over rates.

Americoal Corporation v. Boone County Water and Sewer District, Case No. 90-108 (Ky.P.S.C. April 24, 1992) at 5-7, *rev'd on other grounds*, 949 S.W.2d 588 (1997). So important is the filed rate doctrine that we have described it as the bedrock of utility rate regulation and declared that [e]ven the smallest erosion of this rule must be avoided. North Marshall Water District, Case No. 95-107 (Ky.P.S.C. Oct. 13, 1995) at 3.

Assessment of Developer's Fee and Customer Participation Fee

The Commission has closely examined Kentucky Turnpike's rate schedule and finds no reference to developer's fees or impact fee.¹⁰ Kentucky Turnpike Rule 26, which governs of the donation of water distribution mains, states:

Applicant may construct and donate to District, the extension, as a contribution in aid of construction, meeting

¹⁰ Kentucky Turnpike Tariff Sheet No. 20 refers to the Impact Fee as provided for in this tariff. This reference is apparently to an impact fee that Kentucky Turnpike proposed in June 1995 but subsequently rescinded. Kentucky Turnpike Tariff Sheet 15A (filed Aug. 8, 1995).

all the District's specifications and approval. District reserves the right to stipulate applicable engineering, legal and administrative factors. Applicant shall pay all cost of district as a contribution in aid of construction. Any extension made under this option shall not be eligible for refund.

Under the literal terms of Kentucky Turnpike's filed rate schedules, Burke Realty, Miller and Haarman were not required to pay any fee for their proposed water main extensions.

Conceding that no reference to developer's fees or impact fee is contained in its filed rate schedules, Kentucky Turnpike argues that it may impose such fees through a special contract. It argues that the Commission in Case No. 96-247¹¹ directed the water district to assess these fees through a special contract and then file an executed copy of the contract with the Commission prior to the assessment of such fees. Since no developer has executed a special contract for a main extension to the Cedar Grove Road Transmission Main, no contracts have yet been filed with the Commission.¹²

Administrative Regulation 807 KAR 5:011, Section 13, authorizes a utility to enter special contracts and requires that such contracts be filed with Commission. This regulation, however, assumes that a utility and the customer have voluntarily agreed to the rates, charges or conditions of service that are not set forth in the utility's filed rate schedules. It does not permit a utility to impose such rates, charges or conditions of service over the customer's objection. Where the customer objects to the proposed special contract, a utility must provide utility service under the terms set forth in the utility's filed rate schedule. If a utility's filed rate schedules make no provision for the

¹¹ Kentucky Turnpike Water District, Case No. 96-247 (Ky.P.S.C. Mar. 18, 1997).

¹² Kentucky Turnpike Water District's Brief at 13-14 (filed April 30, 1998). Since filing its brief, Kentucky Turnpike has executed contracts with John Miller and Richard Haarman and has filed those agreements in the record of this proceeding.

requested service, then the utility has no obligation to provide the service.¹³ See Americoal Corp. v. Boone County Water and Sewer District, Case No. 90-108 (Jan. 16, 1992) at 4-5.

In the case at bar, Kentucky Turnpike sought to enter special contracts with developers whose subdivision developments would connect to the Cedar Grove Road Transmission Main. When these developers failed to accept Kentucky Turnpike's proposed terms, Kentucky Turnpike refused to provide service under the terms set forth in its filed rate schedules. It instead attempted to coerce the subdivision developers' acceptance of its proposed terms by refusing to permit the subdivision's water distribution mains to connect to the Cedar Grove Road Transmission Main as required by its filed rate schedules.

The Commission's Order in Case No. 96-247 provides no support for Kentucky Turnpike's actions. In Case No. 96-247, the water district applied for an impact fee for all new development within Division II. The water district's immediate intention was to address the need for system improvements in the Beech Grove Road area of Bullitt County, Kentucky. Existing water distribution facilities in that area were inadequate to serve several proposed subdivision developments and the water district lacked sufficient financial resources to upgrade those facilities. The subdivision developers voluntarily agreed to make contributions toward the cost of these improvements. Each developer's contribution was based upon the number of lots within the subdivision connecting to the proposed improvements. Based upon suggestions from the Commission's staff, the water district modified its proposal to address only the Beech

¹³ The prospective customer retains the right to file a complaint with the Commission. KRS 278.260(1). The Commission has the authority to require the utility to provide utility service and establish the conditions for such service. KRS 278.280(1).

Grove Road area and to implement the contribution through a special contract rather than a new rate.

Case No. 96-247 and the current case differ in several respects. First, Case No. 96-247 contains no evidence that the developers' agreement to pay a contribution was coerced. The developers recognized that contributions were necessary for the success of their developments and voluntarily agreed to them. The contributions were for facilities that were not yet constructed. Second, unlike the current case, the form of the proposed contract and the underlying concepts in Case No. 96-247 were reviewed and approved by the Commission before the water district presented any contract to a subdivision developer. Third, the service area in question in Case No. 96-247 is not the same area involved in this case.

Most importantly, the Commission in Case No. 96-247 rejected the proposal for a mandatory impact fee for all new development within Division II. Nowhere in our Order of March 18, 1997 do we expressly or implicitly endorse the concept of a mandatory impact fee on developers. Our references to impact fee in the Order refer only to the contributions in aid of construction that developers were voluntarily making to upgrade Kentucky Turnpike's water distribution system in the Beech Grove Road area.

Kentucky Turnpike also argues that its assessment of the developer's fee is consistent with its right under its filed rate schedules to stipulate applicable engineering, legal and administrative factors.¹⁴ Its assessment of the developer's fee, it asserts, represents reasonable, indeed prudent, utility practice.

The Commission finds no merit in this argument. The developer's fee is not related to any engineering, legal or administrative factor associated with any of the

¹⁴ Kentucky Turnpike Tariff Sheet No. 16.

proposed water main extensions. Its sole purpose is to pay for the Cedar Grove Road Main.

The actions of the water district and of the Commission in Case No. 96-247 do not support this argument. If the developer's fee is an administrative factor that Kentucky Turnpike may stipulate, then it had no reason to revise its filed rate schedules to provide for the assessment of such fee. The Commission, moreover, would have had no basis to reject the proposed impact fee since under this argument Kentucky Turnpike's filed rate schedule already authorized its assessment.

Acceptance of Kentucky Turnpike's argument would render KRS 278.160 meaningless. A principal purpose of KRS 278.160 is to ensure that the Commission has reviewed and approved all utility rates and charges. If a utility were permitted to escape Commission review of a significant charge by merely labeling it an administrative factor, then virtually every charge would be exempted from Commission review.

In summary, the Commission finds the developer's fee that Kentucky Turnpike seeks to impose is not set forth in its filed rate schedules. Accordingly, KRS 278.160(2) prohibits Kentucky Turnpike from requiring payment of such fee as a condition for service or for connection to the Cedar Grove Road Transmission Main.

Customer Participation Fee

The Commission's review of Kentucky Turnpike's filed rate schedules failed to reveal any reference to customer participation fees. Kentucky Turnpike has advanced the same arguments in defense of its assessment of these fees as it did for the

developer s fees. For the same reasons, we reject these arguments as they apply to the customer participation fee.¹⁵

Other Conditions of Service

Burke Realty has objected to certain conditions that Kentucky Turnpike has attached to the approval and acceptance of the Serene Meadows Subdivision and Dreams End Lane main extensions. It contends that these conditions are not published in Kentucky Turnpike s filed rate schedules and that each condition is unreasonable and discriminatory. Kentucky Turnpike contends that each condition is a reasonable engineering, legal or administrative factor that it may stipulate under its filed rate schedule. The Commission will examine each condition separately.¹⁶

Easement to Loop Water Main. Kentucky Turnpike requests that Burke Realty grant a 20-foot easement in its favor along four lots within the proposed Serene Meadows Subdivision to allow the water district to loop the proposed 6-inch main into other proposed water mains. Kentucky Turnpike asserts that the looping would

¹⁵ The Commission notes that Administrative Regulation 807 KAR 5:066, Section 11(4), would authorize the assessment of a customer participation fee as part of a water main extension plan. This regulation permits a water utility to make extensions [of service] under different arrangements [than specified in Administrative Regulation 807 KAR 5:066, Sections 1 and 2, if such arrangements have **receive the prior approval of the commission** [emphasis added]. Kentucky Turnpike never submitted for Commission approval a water main extension plan for the Cedar Grove Road Transmission Main prior to its attempt to assess from Burke Realty customer participation fees.

¹⁶ We will not discuss those conditions of service that Burke Realty agreed to accept after the filing of its complaint. These include use of counter-clockwise threads on fire hydrants, Division of Water approval of all submitted plans, and submission of an application for a water main extension to Dreams End Lane. For a list of the conditions of service and Burke Realty s response, see Kentucky Turnpike s Notice of Conditions of Service (filed Dec. 31, 1997) and Complainant s Response to Notice of Conditions of Service (filed Jan. 12, 1998).

eliminate a dead end line and alleviate the need to flush water lines. It contends that its request is consistent with water industry standards.

Burke Realty contends that, in addition to the lack of any expressed requirement for such easement in Kentucky Turnpike's filed rate schedules, it is unable to fulfill this request. It states that contracts for the sale of the lots in question have already been executed and that Administrative Regulation 807 KAR 5:006, Section 5, prohibits a utility from requiring a customer to obtain easements on property that he does not own.

We find that the water district's request is reasonable and is an appropriate engineering factor. As title to the property in question has not transferred, Administrative Regulation 807 KAR 5:006, Section 5, is not applicable. Moreover, this regulation was not intended to remove a subdivision developer's obligation to provide utility easements on lots within his or her proposed subdivision. The power to grant an easement clearly belongs to the developer. To the extent that Burke Realty executed contracts for the sale of subdivision lots before applying to Kentucky Turnpike and learning of its conditions of service, it must bear the consequences.

Easement for Donated Water Mains. Kentucky Turnpike requests that Burke Realty's subdivision plans provide for a water line easement for the 6-inch main that will be donated to the water district. Burke Realty contends that this easement is readily apparent from the existing plans on file in the Office of the Bullitt County Clerk. We find that the water district's request is reasonable as an appropriate engineering and administrative factor.

Dedication of Dreams End Lane. Kentucky Turnpike requests that Burke Realty dedicate Dreams End Lane as a public right-of-way. It contends that such action is needed to ensure its right to access the donated water mains. Contending that Dreams

End Lane is a dead end road, Burke Realty has offered to dedicate Dreams End Lane for the use of all owners of property along Dreams End Lane. The Commission finds that the water district's request is based upon a valid purpose, is not unreasonable, and is an appropriate administrative and engineering factor. We further find that Burke Realty can satisfy this condition of service by dedicating a public utility easement that grants the water district unlimited access to Dreams End Lane to service and maintain the water main in question.

Submission of As-Built Drawings and Easement. Kentucky Turnpike requires that Burke Realty provide as-built drawings showing the exact location of the Dreams End Lane water main. It further requires that Burke Realty provide an easement for the Dreams End Lane water main that has been properly surveyed and recorded by a licensed engineer. Burke Realty objects to the latter requirement as excessive. We, however, do not find the proposed condition to be excessive or unreasonable.

Reimbursement of Engineering Costs. Kentucky Turnpike asserts that it paid for the engineering costs of drawing the plans for the Dreams End Lane water main. It contends that Gerald Burke, while manager of Kentucky Turnpike, misused his position to cause the preparation of the engineering plans and designs for Dreams End Lane water main. Burke Realty then used these plans and designs to construct the extension. Burke Realty, the water district argues, should therefore reimburse the water district for the engineering and design costs.

The Commission finds this condition is not an engineering, legal or administrative factor that the water district may stipulate. Kentucky Turnpike is clearly attempting to recover from Mr. Burke costs related to an alleged breach of his fiduciary duties. The

appropriate vehicle for such recovery is the judicial system, not the use of the water utility's power to refuse service.

Construction of Parallel Distribution Lines. As a condition for its acceptance of the Dreams End Lane 6-inch water main, Kentucky Turnpike insists that Burke Realty construct two parallel 3-inch water mains to run along Dreams End Lane. It argues that only two homes are located on this road and the construction of others is unlikely. As a result, the volume of water consumed will not be sufficient to ensure adequate water flow or an adequate chlorine residual. Frequent flushing of the water main will likely be required. While the existing main can be used solely for fire protection purposes, smaller water lines should be constructed on each side of Dreams End Lane to ensure the residents safe drinking water.

We find that a reasonable basis exists for the imposition of this requirement. While Burke Realty notes that the Division of Water has approved the plans for the Dreams End Lane water main, the record shows that Division of Water officials were not fully aware of the facts surrounding the water main and have concerns about the use of the water main. The record also supports the water district's assertion that use of the 6-inch main to serve only two homes may result in significant costs for line flushing. The requirement is an engineering factor that Kentucky Turnpike is authorized to impose.

CONCLUSION

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

1. Kentucky Turnpike shall immediately cease assessing its developer fee to subdivision developers connecting their subdivision developments to the Cedar Grove Road Transmission Main.

2. Kentucky Turnpike shall within 30 days of this Order refund all developer fees assessed to and collected from John Miller and Richard Haarman for connections made to the Cedar Grove Road Transmission Main.

3. Kentucky Turnpike shall cease assessing a customer participation fee to any prospective customer seeking to connect his or her structure to the Cedar Grove Road Transmission.

4. Kentucky Turnpike shall cease requiring as a condition of providing water service to Burke Realty on Dreams End Lane the payment of any engineering costs related to the original design of the Dreams End Lane extension.

5. Within 30 days of the date of this Order, Kentucky Turnpike shall show cause in writing why it should not be required to refund all customer participation fees collected from customers who connected to the Cedar Grove Road Transmission Main. In its written response to this Order, Kentucky Turnpike shall further indicate whether it wishes a hearing on this issue.

6. Those portions of Burke Realty's complaint that are not specifically addressed in Ordering Paragraphs 1 through 4 are denied.

Done at Frankfort, Kentucky, this 1st day of September, 1999.

By the Commission

ATTEST:

Executive Director