

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

CENTER SERVICES, INC.)	
)	
COMPLAINANT)	
)	
v.)	CASE NO. 98-172
)	
HIMA-SIBERT WATER DISTRICT)	
)	
DEFENDANT)	

ORDER

Center Services, Inc. (“Center Services”) brings a formal complaint against Hima-Sibert Water District (“Hima-Sibert”) for recovery of \$20,200 paid for excessive water usage that allegedly resulted from the utility’s negligent metering and billing. Hima-Sibert counterclaims for \$16,609 of unbilled water service that Center Services allegedly received from December 13, 1995 to December 12, 1997. Finding that the Commission lacks jurisdiction to award damages for negligent metering and billing, we dismiss the complaint. Further finding that Hima-Sibert overbilled Center Services \$2,508.70 between April 1996 and December 1997, we deny Hima-Sibert’s counterclaim and direct the water utility to refund that amount to the Complainant.

STATEMENT OF THE CASE

Hima-Sibert, a water district organized pursuant to KRS Chapter 74, provides water service to portions of Clay County, Kentucky. It has no water production facilities, but instead purchases its water requirements from the city of Manchester, Kentucky.

Manchester Mall Associates owns a shopping center ("Manchester Mall") located near Manchester, Kentucky. This shopping center has approximately 26 tenant shops and stores. These tenants include a grocery, an auto parts store, a department store, and some general offices. Center Services, a Kentucky corporation, is Manchester Mall Associates' managing agent and operates the facility. It purchases water service from Hima-Sibert for the Manchester Mall and is billed for this service. It in turn bills the Manchester Mall's tenants for water service based upon the size of their rental space. With two exceptions, Center Services does not meter the water usage of any tenant.

In September or October 1994, Mike Centers, an employee of Seahorse Water Meter Service ("Seahorse") and a licensed meter tester, removed, tested and cleaned the water meter serving the Manchester Mall. Centers found that the meter had a defective chamber and was registering only 80 percent of water flow. Seahorse notified Joe T. Gregory, Hima-Sibert's manager, of the test results and advised that it did not have the necessary replacement parts or a replacement meter. Gregory directed that the defective meter be returned to service. Thereafter, Hima-Sibert billed Center Services based upon estimated usage.

According to Gregory and Centers, Gregory told an employee of Center Services that the meter was defective and that the shopping center was responsible for its replacement. Center Services denies that any of its employees were notified of the meter's condition. There is no evidence that Center Services was advised in writing of the meter's condition.

In 1995 Centers, who had since been hired as a meter reader for Hima-Sibert, discovered that the meter had totally ceased to function. He reported the problem to Gregory. Centers and Gregory contend that they advised an employee of Center

Services of the meter problems. Gregory further states that he told Center Services that it was responsible for replacing the defective meter. Center Services denies that such conversations occurred. Hima-Sibert took no further action regarding the defective meter and continued to estimate the amount of water provided to the Manchester Mall for billing purposes.

In December 1997, after the city of Manchester, Kentucky, which provides sanitary sewer service to the Manchester Mall, advised Hima-Sibert that its water service would be terminated if the defective meter was not replaced, the water district replaced the meter. Hima-Sibert then attempted to charge Center Services for the replacement's cost. When subsequently informed that it was responsible for the replacement's cost, the water district ceased its efforts to collect reimbursement for the meter and sought to bill Center Services for unbilled service.

On October 31, 1998, Hima-Sibert billed Center Services \$16,609.20 for unbilled water service received from January 1995 to December 1997. The water district determined the amount of unbilled service by averaging Center Services' water usage for the first nine months of 1998 and comparing this average to the billed monthly average for the 24-months.

Refusing to pay this bill, Center Services filed a complaint with the Commission. While not disputing that unbilled water service may have been provided, it contended that KRS 278.220¹ limited its liability to any unbilled service received from October 1995 to October 1997. It further contended that the calculation of any unbilled amount should

¹ All service supplied by a utility shall be billed within two (2) years of the service. No customer shall be liable for unbilled service after two (2) years from the date of the service, unless the customer obtained the service through fraud, theft, or deception.

be based upon its historical usage from December 1991 through January 1993 and from September 1994 through November 1995. Center Services asserted that, because of leaks within its own distribution system during other periods, an accurate assessment of its usage could only be determined using these periods.

During the discovery phase of this proceeding, Center Services amended its Complaint to request a damage award of \$32,411.07 from Hima-Sibert. It alleged that Hima-Sibert failed to provide an accurate, functioning meter to register its water usage and to advise it that all billings for water service were estimated. It further alleged that it overpaid \$12,210.75 for sanitary sewer services from November 1995 to January 1999 and \$20,200.32 for water services during the same period as a result of “inaccurate water usage resulting from Defendant’s negligence.”

In response to Center Services’ Amended Complaint, Hima-Sibert moved for dismissal of those portions of the Amended Complaint that related to sanitary sewer service. It also counterclaimed for \$16,609.20 for unbilled water service that Center Services allegedly received through the defective water meter. Finding that we lacked jurisdiction over the charges that Manchester assessed to Center Services for sanitary sewer service and lacked authority to adjudicate claims arising out of a utility’s negligence, we granted Hima-Sibert’s motion.

DISCUSSION

Commission Jurisdiction

The Commission has limited powers over public utilities. Boone County Water and Sewer District v. Pub. Serv. Com’n, Ky., 949 S.W.2d 588, 591 (1997) (“The PSC is a creature of statute and has only such powers as have been granted to it by the General Assembly”). KRS 278.260 grants to the Commission only “original jurisdiction

over complaints as to rates or service of any utility.” No provision of KRS Chapter 278 confers upon us the authority to award damages resulting from a utility’s negligence.

Center Services’ Amended Complaint does not involve utility rates or service. It involves damages allegedly suffered because of Hima-Sibert’s unreasonable and imprudent actions. It does not allege that it failed to receive the quantity of water billed or that it was billed at an improper rate. It instead alleges that, had the water district properly metered its water service, it would have discovered and repaired the leaks on its property earlier and thus avoided additional water consumption.

Kentucky courts have refused to extend the Commission’s jurisdiction to include damage claims arising out of the negligent provision of utility service. In Carr v. Cincinnati Bell, Inc., Ky.App., 651 S.W.2d 126 (1983), a customer brought an action in Kenton Circuit Court seeking, among other things, compensatory damages for tortious breach of contract for telephone service. Holding that the Commission had exclusive jurisdiction over the matter, Kenton Circuit Court dismissed the action. The customer appealed to the Kentucky Court of Appeals. Reversing the circuit court’s decision on this issue, that Court stated:

[A]ppellant seeks damages for breach of contract. Nowhere in Chapter 278 do we find a delegation of power to the PSC to adjudicate contract claims for unliquidated damages. Nor would it be reasonable to infer that the Commission is so empowered or equipped to handle such claims consistent with constitutional requirement. Kentucky Constitution Sec. 14.

Id. at 128.

Since we are without jurisdiction over the subject matter of Center Services’ complaint, our only course of action is to dismiss its claim for damages.

Billing Adjustments

Both parties assert, and the evidence of record clearly shows, that the meter registering Center Services' water service was not functioning properly prior to December 1997. In such event, Administrative Regulation 807 KAR 5:006, Section 10(2), requires the water utility to "immediately determine the period during which the error has existed, and . . . recompute and adjust the customer's bill to either provide a refund to the customer or collect an additional amount of revenue from the underbilled customer." Any readjustment must be based upon the period during which the error existed. Clearly, Center Services' monthly bills must be adjusted to reflect its actual usage.

The parties differ on the appropriate period upon which to base Center Services' usage. Hima-Sibert argues that historic usage should be based upon the Complainant's usage since December 1997. While Center Services concedes that meter readings made since January 1998 are accurate, it argues that it experienced several significant water line leaks between January 1998 and February 1999 and that use of this period to determine "normal" water usage, therefore, is inappropriate. The record shows that, despite drought conditions and a lack of any significant change in the vacancy rate in the Manchester Mall, Center Services' water usage for the period from March 1999 to September 1999 was significantly less than the same period in 1998.

The Commission finds that any adjustment should be based upon usage data from March 1999 to September 1999. The accuracy of Center Services' usage during this period is unquestioned. Moreover, in light of Hima-Sibert's knowing use of a defective meter for three years, it is not appropriate to require Center Services to prove that its facilities were properly functioning and not experiencing any major leaks during

the period that the defective meter was in use. To do so would shift the burden of proof from the utility that failed to properly maintain its metering equipment to a customer who apparently had no knowledge of the defect.

After reviewing Hima-Sibert's billing records, we find that, during the period from March 1999 through September 1999, Center Services used an average of 211,833 gallons of water monthly. This monthly average results in an average monthly bill of \$737.75. A comparison of this monthly average with the amounts actually billed for the period from April 1996 through December 1997 shows that Hima-Sibert overbilled Center Services \$2,508.70 for water service during that period.² Our calculations are appended to this Order.

Utility Management

The Commission admonishes utility management for its conduct in this matter. For three years the water district's management knowingly allowed a defective meter to remain in place. But for Manchester's intervention and demand for the meter's replacement, it is likely that the defective meter would still be in service today. The utility's failure to act is even more egregious when one considers that the meter served one of Hima-Sibert's largest customers. Utility management apparently had no concern about the potential loss of revenue that the defective meter clearly represented.

As troubling as management's cavalier attitude toward the meter's potentially adverse effect on utility revenues is management's lack of knowledge of Commission regulations. It lacked even a basic knowledge of the utility's responsibility for the proper maintenance of its metering equipment and the replacement of defective equipment. Its

² In making our calculations, we have considered the four-year statute of limitations contained in KRS 355.2-725.

assumption that its customers are responsible for the replacement of aging or defective equipment clearly illustrates this point.

Hima-Sibert's management has a clear duty to the public to become fully apprised of all statutory and regulatory obligations, to perform those obligations to the fullest extent possible, and to take all reasonable measures to protect the financial integrity of the water district. The record strongly suggests that management failed to meet this duty. The record also suggests that Hima-Sibert and its management failed to comply with Administrative Regulation 807 KAR 5:066, Section 15(1).³ The Commission finds that, at a minimum, the utility and its management should explain why their conduct in this matter does not constitute a violation of that regulation. For this reason, the Commission has this day established a separate proceeding to address that question.⁴

SUMMARY

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

1. Center Services' claim for damages is dismissed for lack of subject matter jurisdiction.
2. Hima-Sibert's Counterclaim is denied.

³ All meters used for measuring the quantity of water delivered to a customer shall be in good mechanical condition and shall be adequate in size and design for the type of service which they measure.

⁴ Case No. 2000-____, Hima-Sibert Water District – Alleged Violation of Administrative Regulation 807 KAR 5:066, Section 15(1).

3. Within 30 days of the date of this Order, Hima-Sibert shall refund \$2,508.70 to Center Services, Inc. for overcharges that occurred between April 1996 and December 1997.

4. Within 10 days of refunding the overcharges, Hima-Sibert shall advise the Commission in writing that the directed refund has been completed.

Done at Frankfort, Kentucky, this 1st day of May, 2000.

By the Commission

ATTEST:


Executive Director

APPENDIX

AN APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE
COMMISSION IN CASE NO. 98-172 DATED MAY 1, 2000

**CALCULATION OF AVERAGE
MONTHLY USAGE**

Month	Water Usage
March 1999	147,000
April 1999	171,000
May 1999	287,000
June 1999	240,000
August 1999	221,000
September 1999	<u>205,000</u>
Total	<u>1,271,000</u>
Average Monthly Usage	211,833

AVERAGE MONTHLY RATE

RATE BLOCK	NUMBER OF GALLONS	RATE	TOTAL CHARGE PER RATE BLOCK
First 2,000 Gallons	2,000	\$12.75	\$ 12.75
Next 8,000 Gallons	8,000	\$4.35 per 1,000 gals	\$ 34.80
Next 10,000 Gallons	10,000	\$4.00 per 1,000 gals	\$ 40.00
Next 20,000 Gallons	20,000	\$3.70 per 1,000 gals	\$ 74.00
Over 40,000 Gallons	172,000	\$3.35 per 1,000 gals	\$ 576.20
TOTAL	212,000		\$ 737.75

AMOUNT OF OVERBILLING

Month	Total Amount Billed	Tax	Total Billed Excluding Taxes	Average Monthly Bill Excluding Taxes	Overbilled Amount
April 1996	\$687.29	\$56.75	\$630.54	\$737.85	(\$107.31)
May 1996	\$705.56	\$58.26	\$647.30	\$737.85	(\$90.55)
June 1996	\$1,070.71	\$88.41	\$982.30	\$737.85	\$244.45
July 1996	\$1,023.24	\$84.49	\$938.75	\$737.85	\$200.90
August 1996	\$1,421.25	\$117.75	\$1,303.50	\$737.85	\$565.65
September 1996	\$994.03	\$82.08	\$911.95	\$737.85	\$174.10
October 1996	\$1,074.36	\$88.71	\$985.65	\$737.85	\$247.80
November 1996	\$793.19	\$65.49	\$727.70	\$737.85	(\$10.15)
December 1996	\$738.42	\$60.97	\$677.45	\$737.85	(\$60.40)
January 1997	\$990.38	\$81.78	\$908.60	\$737.85	\$170.75
February 1997	\$785.89	\$64.89	\$721.00	\$737.85	(\$16.85)
March 1997	\$1,023.24	\$84.49	\$938.75	\$737.85	\$200.90
April 1997	\$986.73	\$81.48	\$905.25	\$737.85	\$167.40
May 1997	\$1,249.62	\$103.18	\$1,146.44	\$737.85	\$408.59
June 1997	\$1,282.50	\$105.90	\$1,176.60	\$737.85	\$438.75
July 1997	\$1,136.44	\$93.84	\$1,042.60	\$737.85	\$304.75
August 1997	\$986.73	\$81.48	\$905.25	\$737.85	\$167.40
September 1996	\$745.73	\$61.58	\$684.15	\$737.85	(\$53.70)
October 1997	\$409.79	\$33.84	\$375.95	\$737.85	(\$361.90)
November 1997	\$760.33	\$64.06	\$696.27	\$737.85	(\$41.58)
December 1997	\$760.33	\$62.78	\$697.55	\$737.85	(\$40.30)
TOTAL	\$19,625.76	\$1,622.21	\$18,003.55	\$15,494.85	\$2,508.70