

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE HARBOR AT HARRODS CREEK)	
CONDOMINIUM ASSOCIATION)	
)	
COMPLAINANT)	
)	
v.)	CASE NO. 2000-379
)	
FOURTH AVENUE CORPORATION - LONG)	
CORPORATION, JOINT VENTURE D/B/A SHADOW)	
WOOD SUBDIVISION SEWER SERVICE)	
)	
DEFENDANT)	

O R D E R

On July 28, 2000, The Harbor at Harrods Creek Condominium Association (“The Harbor”), through Craig Oliver, its Treasurer, filed a formal complaint against Fourth Avenue Corporation – Long Corporation, Joint Venture d/b/a Shadow Wood Subdivision Sewer Service (“Fourth Avenue”). The Harbor is a non-profit, Kentucky corporation (identification number 0157714) authorized to do business in Kentucky since June 1981. Fourth Avenue is a Kentucky corporation (identification number 0114621) authorized by the Office of the Secretary of State of the Commonwealth of Kentucky to do business in Kentucky since April 1914. Fourth Avenue is a utility located in Jefferson County, Kentucky that provides sewer service to 248 customers. Fourth Avenue is a utility pursuant to KRS 278.010 and, as such, is subject to Commission jurisdiction pursuant to KRS 278.040.

In its complaint, The Harbor alleges that it has been and is being incorrectly billed for water services provided by the Louisville Water Company to a waste treatment plant owned by Fourth Avenue. The total amount allegedly over-billed for the past 8 years is \$5,684.08. The Harbor also alleges that it has been paying excessive drainage costs to Metropolitan Sewer District (“MSD”) of Louisville because Fourth Avenue, when it transferred management responsibility to The Harbor 13 years ago, failed to inform The Harbor that it should conduct a survey that could reduce the drainage costs. The Harbor estimates that it has been over-billed approximately \$60,000 for drainage costs. Finally, The Harbor alleges that Fourth Avenue is over-billing it for sewer services.

Fourth Avenue’s rates that are charged to The Harbor are based upon the number of bedrooms per unit. Three-bedroom units are charged \$26.50 per month, and two-bedroom units are charged \$19.90 per month. The Harbor claims that it contains 144 two-bedroom units and 24 three-bedroom units, while Fourth Avenue is billing The Harbor for 77 two-bedroom units and 91 three-bedroom units. The Harbor claims that because of this discrepancy, Fourth Avenue has over-billed The Harbor \$68,983.20 during the past 13 years. Additionally, The Harbor alleges that Fourth Avenue has been incorrectly billing an untariffed charge of \$50 per month for The Harbor’s clubhouse. When calculations include the time value of money,¹ The Harbor claims it is due \$141,726.00 for the alleged over-billing.

Fourth Avenue filed its answer, citing numerous defenses, on August 18, 2000. In its answer, Fourth Avenue first addresses The Harbor’s allegation that Fourth Avenue failed to inform The Harbor that The Harbor was paying for water service for a waste

¹ The Harbor calculates such value at 4 percent.

treatment plant. Fourth Avenue argues that: 1) as it is not a utility with respect to the provision of water, the Commission has no jurisdiction over that allegation; 2) there was no overcharge for water service; and 3) The Harbor has failed to establish the amount of any alleged overcharge paid by the members, collectively or individually.

In addressing The Harbor's allegation that Fourth Avenue should have informed The Harbor that a survey should be conducted, Fourth Avenue denies that any survey was necessary or required. It also denies that it was under any duty to conduct such a survey, to obtain credits for The Harbor, or to request a reduction in rates from MSD. Fourth Avenue also argues that it is not a utility with respect to drainage costs and that, therefore, the Commission has no jurisdiction over this allegation. Fourth Avenue next denies over-billing and asserts that The Harbor has not established the amount of any alleged overcharge paid by The Harbor's members.

The Commission, by Order dated October 30, 2000, dismissed for lack of jurisdiction the portions of The Harbor's complaint addressing drainage costs and alleged over-billing for water service. In the same Order, the Commission scheduled an informal conference and directed The Harbor to retain an attorney for representation before the Commission.

The Harbor, Fourth Avenue and Commission Staff participated in an informal conference on November 9, 2000 at the Commission's offices. During the course of the informal conference, Commission Staff advised both parties that it would be helpful if the parties could engage in settlement negotiations. Commission Staff agreed to withhold scheduling a hearing on the matter as long as good faith settlement negotiations continued. At a subsequent date, counsel for The Harbor informed

Commission Staff that the parties had reached no settlement. The Commission then issued a procedural Order on January 18, 2001, scheduling a hearing on April 4, 2001. By later Order, the date of the hearing was moved to April 17, 2001.

On April 17, 2001, the parties appeared before the Hearing Examiner for a hearing. Parties previously had informed Commission Staff that settlement was unattainable. F. Larkin Fore appeared as counsel for The Harbor and Ed Busch appeared as counsel for Fourth Avenue.

The hearing began at 9 a.m. and continued until approximately 11:25 a.m. Both parties agreed to allow a representative from the Louisville Water Company to testify first. The representative testified to Louisville Water Company's billing practices that it conducts on behalf of Fourth Avenue. After the witness presented his testimony, the Hearing Examiner called all attorneys to the bench to conduct a conference off the record at which point the Hearing Examiner recessed the hearing and instructed the parties to engage in good faith settlement negotiations. At approximately 2:45 p.m., Fourth Avenue proposed a settlement agreement to The Harbor that The Harbor agreed to present to its Board of Directors. A hearing date was set for April 30, 2001 in the event the Board of Directors rejected the settlement offer. Subsequently, the Board of Directors rejected the offer.

The parties appeared before the Hearing Examiner at 9:00 a.m. on April 30, 2001. The Hearing Examiner directed the parties to provide a list of the specific units upon which the parties disagreed and the reasons for such disagreements. The parties produced a list of 64 units upon which they disagreed. Both parties stipulated that they

agreed to the billing of the remaining 104 units. Both parties also agreed upon the floor plans of the 64 units in dispute.

The hearing then continued. The sole witness called by The Harbor was Martha Sammons, a former President of The Harbor who assisted in conducting a survey among The Harbor's residents. The survey asked the residents of each unit to list the number of bedrooms in their units. The survey relied upon the actual use of a room when defining it as a bedroom. Ms. Sammons's testimony consisted of her observations concerning a number of the units in which she had visited. In regard to her testimony relating to the units she had not entered, she relied upon the resident surveys. Fourth Avenue called Clay Long as its sole witness who testified to Fourth Avenue's billing practices and the history and rationale of such billing.

DISCUSSION

The \$50 Per Month Charge for The Harbor's Clubhouse

Fourth Avenue, in addition to allegedly incorrectly billing The Harbor for the proper number of bedrooms in each unit, was billing The Harbor a charge of \$50.00 per month for The Harbor's clubhouse. This rate does not, however, appear in Fourth Avenue's tariff on file with the Commission.

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 contract, depart from them. Corporation De Gestion Ste-Foy v. Florida Power and Light Co., 385 So.2d 124 (Fla. Dist. Ct. App. 1980).² A similar rule applies to the published rate schedules of common carriers. See, e.g., Sallee Horse Vans, Inc. v. Pessin, Ky. App., 763 S.W.2d 149 (1988).

Failure to file with the Commission a rate schedule for its regulated services deprives a utility of the right to charge or collect those rates. A utility “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). See also GTE North Inc. v. Pub Serv. Comm’n 500 N.W.2d 284, 289 (Wis. 1993) (“the receipt of compensation by a utility that is either greater or lesser than the filed rate is an unlawful act”).

The evidence of record shows that Fourth Avenue violated KRS 278.160 by charging and collecting rates other than those set forth in its filed rate schedules.

² See also Haverhill Gas Co. v. Findlen, 258 N.E. 2d 294 (Mass. 1970); Laclede Gas Co. v. Solon Gershman, Inc.; Laclede Gas Co. v. Solon Gershman, Inc., (539 S.W.2d 574 (Mo. App. 1976); Capital Properties Cp. V. Pub Serv. Comm’n, 457 N.Y.S.2d 635 (N.Y. App. Div. 1982); West Penn Power Co. v. Nationwide Mut. Ins. Co., 228 A.2d 218 (Pa. Super. Ct. 1967); Wisconsin Power & Light Co. v. Berlin Tanning & Mfg. Co., 83 N.W.2d 147 (Wis. 1957).

Accordingly, Fourth Avenue must refund the \$50 charge for the clubhouse charged during the term of the applicable statute of limitations as discussed below.

Statute of Limitations

The Harbor contends that it is entitled to recover all over-billed amounts from when the over-billing began to the present. That is not the case. Pursuant to KRS 413.120(2), an action upon a liability created by statute has a 5 year statute of limitations when no other time is fixed by the statute creating the liability. Fourth Avenue's rates are governed by its tariff, the rates of which Fourth Avenue must charge in accordance with KRS 278.160(2). In the present case, an action for violation of KRS 278.160 accrued when the utility allegedly improperly billed its customers. Either the Commission or individual customers subject to the billing could initiate administrative or judicial proceedings against Fourth Avenue for these violations. The Harbor, in filing its complaint on July 28, 2000, commenced an action against Fourth Avenue and stopped the running of the statute of limitations. Any calculation on over-billed amounts subject to recovery, therefore, must be based upon this date.

The Dispute Concerning Bedroom Units and Fourth Avenue's Tariff

In administrative proceedings, the general rule is that an applicant for relief has the burden of proof. Personnel Bd. v. Heck, Ky. App., 725 S.W.2d 13, (1986) at 17, citing 73A C.J.S Public Administrative Law and Procedure § 128. In arguing that the word "bedroom" has been misapplied by Fourth Avenue, The Harbor is seeking relief for an alleged over-billing and, therefore, bears the burden of proof in this proceeding.

In order to meet its burden of proof, The Harbor's contention that Fourth Avenue is unfairly and incorrectly applying the provisions of its tariff must be proven by

substantial evidence.³ “An administrative decision granting relief to one having the burden of proof must be supported by findings based upon substantial evidence. Without such support, the decision is arbitrary and cannot weather judicial review.” Bourbon County Bd. of Adjustment v. Currans, Ky.App., 873 S.W.2d 836 (1994), at 838.

The Commission finds that The Harbor has failed to meet its burden of proof on this issue. The Harbor relies upon surveys conducted by residents of The Harbor and the first-hand impressions of two members of The Harbor who had entered some, but not all, of the units in the complex. This evidence amounts to hearsay at best and is insufficient to support a finding in favor of The Harbor. Furthermore, there are reasonable arguments in favor of both parties’ proffered definitions of the term “bedroom,” the number of which determines the rate to be paid pursuant to the tariff at issue. Under the circumstances, the Commission cannot reject the utility’s interpretation of its own tariff. However, this case has demonstrated that sufficient confusion is engendered by the terms of the tariff to justify revisiting the propriety of those terms in Fourth Avenue’s next rate proceeding. In the meantime, the Commission accepts the terms of the parties’ partial agreement as to the number of bedrooms in specific units.

The Commission, having been sufficiently advised, THEREFORE ORDERS that:

1. Fourth Avenue shall refund the amount of over-billing as set forth in Attachment A.
2. Fourth Avenue shall cease and desist from collecting the untariffed monthly charge of \$50.00 for The Harbor’s Clubhouse.

³ See KRS 13B.090.

3. Fourth Avenue shall, in its next rate case, consider revising its method of calculating sewer charges so to avoid further confusion.

Done at Frankfort, Kentucky, this 14th day of August, 2001.

By the Commission

ATTEST:


Executive Director

APPENDIX A

APPENDIX TO AN ORDER
OF THE KENTUCKY PUBLIC SERVICE COMMISSION IN
CASE NO. 2000-379 DATED
AUGUST 14, 2001

APPENDIX A

	Over Collection	Interest on Prior		
	((3 units x \$6.60 over	Balance at an Annual		
Collection	charge) + \$50 non tariffed	Rate of 4 Percent		
Date	charge) x 2 months	Compounded Bi-Monthly	Balance	
8/30/95	139.60		139.60	
10/30/95	139.60	0.93	280.13	
12/30/95	139.60	1.87	421.60	
2/28/96	139.60	2.81	564.01	
4/30/96	139.60	3.76	707.37	
6/30/96	139.60	4.72	851.68	
8/30/96	139.60	5.68	996.96	
10/30/96	139.60	6.65	1,143.21	
12/30/96	139.60	7.62	1,290.43	
2/28/97	139.60	8.60	1,438.63	
4/30/97	139.60	9.59	1,587.82	
6/30/97	139.60	10.59	1,738.01	
8/30/97	139.60	11.59	1,889.20	
10/30/97	139.60	12.59	2,041.39	
12/30/97	139.60	13.61	2,194.60	
2/28/98	139.60	14.63	2,348.83	
4/30/98	139.60	15.66	2,504.09	
6/30/98			2,660.38	

	139.60	16.69		
8/30/98	139.60	17.74	2,817.72	
10/30/98	139.60	18.78	2,976.10	
12/30/98	139.60	19.84	3,135.55	
2/28/99	139.60	20.90	3,296.05	
4/30/99	139.60	21.97	3,457.62	
6/30/99	139.60	23.05	3,620.27	
8/30/99	139.60	24.14	3,784.01	
10/30/99	139.60	25.23	3,948.84	
12/30/99	139.60	26.33	4,114.76	
2/28/00	139.60	27.43	4,281.79	
4/30/00	139.60	28.55	4,449.94	
6/30/00	139.60	29.67	4,619.20	
Calculation of Refund Amount Up To Present Time.				
Collection				
Date	Over Collection	Interest	Balance	
8/30/00	139.60	30.79	4,789.60	
10/30/00	139.60	31.93	4,961.13	
12/30/00	139.60	33.07	5,133.80	
2/28/01	139.60	34.23	5,307.63	
4/30/01	139.60	35.38	5,482.61	
6/30/01	139.60	36.55	5,658.76	