

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 August 14, 2001, the Commission entered a final Order in this case. On August 30, 2001, Complainant filed a Petition for Rehearing, and on August 31, 2001, Defendant filed a Petition for Rehearing. The Commission will address each of the petitions in turn.

Complainant's Argument

In its Order of August 14, 2001, the Commission applied KRS 413.120(2) to determine the proper period of time over which to order a refund. Complainant argues that the proper statute of limitations is KRS 413.120(11), which provides a 5-year statute of limitations in actions involving an open account between merchants. The statute begins to run at the last billing on the account. Complainant maintains that it is a

merchant, and, therefore, as the account is still open, the statute of limitations has not begun to run.

The Commission does not agree with Complainant's contention. The threshold question is whether Complainant is, in fact, a "merchant." A merchant is defined in KRS 355.2-104.<sup>1</sup> KRS 355.2-104(1) provides that a merchant is a "person who deals in goods" and who "holds himself out as having knowledge or skill peculiar to the practices of the goods involved in the transaction." Complainant claims neither to have any special knowledge in providing sewer service nor to deal "in goods." Complainant operates merely as an entity that passes along the costs of service and is not a "merchant" as contemplated by KRS 255.2-104. Accordingly, KRS 413.120(11) does not apply because a merchant account requires that both parties to the account be merchants.

Complainant also claims that it is incumbent upon the Commission, if it is unsatisfied with the evidence Complainant produced, to conduct its own investigation and find satisfactory evidence. The Commission is not required to bear the burden of

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<sup>1</sup> KRS 355.2-104 provides, in relevant part, as follows:

- (1) "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.
- (2) "Between merchants" means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.

producing evidence at a hearing. Energy Regulatory Commission v. Kentucky Power Company, 605 S.W.2d 46 (Ky.App. 1980), at 50.

#### Defendant's Argument

Defendant argues that the Commission did not give effect to a release signed by Complainant that bars Complainant from recovering any alleged overcharges. Defendant also argues that Complainant is not entitled to any overcharge or interest since its failure to monitor the number of bedrooms contributed to any overcharge. Specifically, Defendant argues that laches and estoppel bar Complainant from bringing a claim for overcharges.

In Boone County Sand and Gravel v. Owen County Rural Electric Cooperative Corporation, 779 S.W.2d 224 (Ky.App. 1989), Owen County RECC brought an action against Boone County Sand and Gravel to recover for amounts that had been underbilled. Boone County Sand and Gravel counterclaimed for damages because it had adjusted its business practices to take into account the rates it was being charged.

Twice during a 13-month period Boone County Sand and Gravel inquired as to the accuracy of the bills. Both times Owen County RECC assured Boone County Sand and Gravel that the billing was correct and, relying upon Owen County RECC's assurances, Boone County Sand and Gravel adjusted its overhead accordingly. In doing so, Boone County Sand and Gravel incurred damages by paying an inflated price for stock when buying back shares from its shareholders.

The Court of Appeals found that, pursuant to KRS 278.160, the utility was entitled to collect the amount underbilled, despite any negligence in underbilling Boone County Sand and Gravel. Equitable estoppel did not apply because application of the

doctrine would enable Boone County Sand and Gravel to receive service at a lesser rate than other customers. Laches did not apply for the same reason.

Boone County Sand and Gravel and KRS 278.160 provide that a utility must collect its tariffed rates, no more and no less. No customers may receive service at a lesser or greater rate than other customers. No agreement between parties or the commission of a tort by either party releases a utility from its duty to charge, and the customer's obligation to pay, the properly tariffed rates.

Defendant also contends that, because Commission Staff sent a letter informing Defendant that it should charge its tariffed commercial rate for sewer service provided to the Clubhouse, the amount of the refund should be adjusted accordingly. Defendant is correct that it was entitled reasonably to rely upon a Staff opinion on the issue. The amount of the refund should be adjusted accordingly.

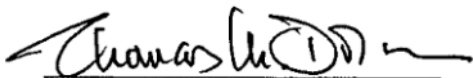
IT IS THEREFORE ORDERED that:

1. Complainant's motion for rehearing is denied in its entirety.
2. Defendant's motion for a rehearing to adjust the amount of the Clubhouse refund is granted. The remaining portion of Defendant's motion is denied.
3. Defendant shall provide the Louisville Water Company billing records for the Clubhouse for the refund period.
4. Upon receipt of the aforementioned billing records, the Commission shall consider proceedings necessary to order adjustment of the refund.

Done at Frankfort, Kentucky, this 19<sup>th</sup> day of September, 2001.

By the Commission

ATTEST:

A handwritten signature in black ink, appearing to read "Charles H. [unclear]", written over a horizontal line.

Executive Director