

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

EAST LOGAN WATER DISTRICT)	
and)	
NORTH LOGAN WATER DISTRICT)	
)	
COMPLAINANTS)	
)	CASE NO. 2001-00212
v.)	
)	
CITY OF RUSSELLVILLE, KENTUCKY)	
)	
DEFENDANT)	

ORDER

This case involves a dispute over the lawfulness of an adjustment in the wholesale water service rates of the city of Russellville, Kentucky (Russellville). It presents the following issue: Does the failure of a city's legislative body to enact an ordinance or otherwise approve a proposed wholesale rate prior to its filing with the Commission render the filing and the proposed rate void? Finding in the affirmative, we declare Russellville's rate of \$2.45 per 1,000 gallons void and direct the city to refund all monies collected prior to the date of this Order in excess of its then lawful rate of \$1.55 per 1,000 gallons.

PROCEDURE

On July 9, 2001, the Districts filed with the Commission a formal complaint against Russellville in which they alleged that Russellville's wholesale rate of \$2.45 per 1,000 gallons did not reflect the actual cost of serving the Districts and was contrary to the parties' existing water service contracts. They further alleged that Russellville had

failed to comply with the procedures set forth in the Commission's regulations. The Districts requested that the current wholesale rate of \$2.45 be declared void or, in the alternative, that the Commission investigate the reasonableness of that rate.

On July 16, 2001, the Districts moved for an Order directing Russellville to continue service to them pending resolution of their Complaint. Russellville responded to this motion on August 1, 2001 and moved for an Order directing each water district to establish an escrow account and place into the account any dispute amounts that Russellville had billed for wholesale water service.

On August 20, 2001, Russellville filed an Answer in which it asserted the lawfulness and reasonableness of the rate in question. It denied any failure to comply with applicable Commission regulations and renewed its motion for an Order requiring the establishment of escrow accounts for disputed amounts.

On October 5, 2001, the Commission granted Russellville's motion for the establishment of escrow accounts and further ordered that an informal conference be held. Following this conference, the Commission established a procedural schedule in this matter to address all issues related to the lawfulness of Russellville's current wholesale rate. It also directed that Russellville provide a certified copy of the ordinance that approved and authorized the current wholesale rate.

Following Russellville's filing of this ordinance, the Commission on December 20, 2001, ordered that Russellville show cause in writing why the current wholesale rate of \$2.45 per 1,000 gallons should not be declared void as Russellville's legislative body had not granted the requisite authorization for such rate. On January 10, 2002, Russellville submitted its written response and requested oral arguments on the issue. It also moved for dismissal of the Districts' Complaint on the grounds that the Complaint

failed to state a prima facie case and that the Commission lacked the legal authority to grant the requested relief.

The following day the Districts moved to hold the case in abeyance pending Commission action on Russellville's Response to the Commission's Order of December 20, 2001 or cancel the scheduled hearing in this matter. The Districts argued that, given the legal nature of the issues raised by Russellville's Response and the Districts' Complaint, no hearing was required. Russellville subsequently moved for oral arguments on these issues.

On January 29, 2002, the Commission held a public hearing on lawfulness of the current wholesale rate. At this hearing, the parties agreed that an evidentiary hearing was not required and agreed to a schedule for the submission of written arguments on this issue and those raised in the parties' motions to dismiss. Following the submission of these briefs and our denial of Russellville's Motion for Oral Argument, the issue of the lawfulness of Russellville's current wholesale rate stood submitted for decision on March 25, 2002.

STATEMENT OF THE CASE

Russellville is a city of the fourth class. KRS 81.010(4). It operates a water treatment and distribution system that provides retail water service to approximately 2,505 customers and wholesale water service to North Logan Water District (North Logan District) and East Logan Water District (East Logan District) (collectively the Districts) and South Logan Water Association (South Logan).¹

¹ In 2001 South Logan Water Association made no purchases from Russellville. See Annual Report of South Logan Water Association to the Public Service Commission for the year ended December 31, 2001 at 31.

North Logan is a water district organized pursuant to KRS Chapter 74. It provides retail water service to 535 customers in the northern portion of Logan County, Kentucky.² It purchases its total water requirement, which in 2001 was approximately 50,173,000 gallons, from Russellville.³

East Logan is a water district organized pursuant to KRS Chapter 74. It provides retail water service to 2,332 customers in the eastern portion of Logan County, Kentucky.⁴ It purchases its total water requirement, which in 2001 was approximately 163,219,000 gallons, from Russellville.⁵

On March 20, 2001, Russellville notified the Districts by letter of its intent to increase its wholesale rate to \$2.45 per 1,000 gallons.⁶ This letter stated:

This letter is to inform you the City of Russellville is in the process of increasing the water rate to \$2.45 per 1,000 gallons. [sic] For all water districts served by Russellville. This is due to the water crisis of 1998. The proposed rate distributes the costs of operating and maintaining the system evenly and fairly.

Mr. Brents Dickerson of BD111 Engineers provided the information to do the wholesale water study. Copies of the study have been mailed to the Public Service Commission for their [sic] review.⁷

² Annual Report of North Logan Water District to the Public Service Commission for the year ended December 31, 2001 at 21.

³ Id. at 25.

⁴ Annual Report of East Logan Water District to the Public Service Commission for the year ended December 31, 2001 at 29.

⁵ Id. at 33.

⁶ Letter from Charles McCollum, Utilities Director, City of Russellville, Kentucky, to C.K. Hanks, Manager, East Logan Water District (March 20, 2001).

⁷ Id.

Russellville submitted a copy of its letter to East Logan and a copy of the cost-of-service study upon which the proposed rate was based to the Commission but provided no additional explanation or any tariff sheet that contained the proposed rates.

On April 23, 2001, Commission Staff advised Russellville by letter that its filing had been received and reviewed.⁸ Commission Staff enclosed with this letter a copy of the cost-of-service study with each page stamped EFFECTIVE APR 21, 2001 PURSUANT TO 807 KAR 5:011, SECTION 9(1). It also requested that Russellville submit tariff sheets setting out the rates to be charged the districts.⁹ Commission Staff made a similar request on June 21, 2001.¹⁰

When Russellville submitted its cost-of-service study to the Commission, its legislative body had not yet approved the rates set forth in that study. On May 24, 1999, Russellville's City Council adopted Ordinance No. 99-8 to revise its water and sewer service rates. While revising existing retail rates, this Ordinance did not revise wholesale rates assessed to the Water Districts but instead noted that [w]holesale rates will be adopted and inserted for the sale of water to Water Districts which purchase water from the City of Russellville.¹¹ The Russellville City Council took no further action until November 20, 2001, when it adopted Ordinance 2001-16, which

⁸ Letter from Jess Helton, Tariffs Review Branch, Public Service Commission, to Charles McCollum, Utilities Director, City of Russellville, Kentucky (April 23, 2001).

⁹ Id. This language suggests that Commission Staff regarded Russellville's submission as a tariff filing made pursuant to Administrative Regulation 807 KAR 5:006, Sections 6 and 9.

¹⁰ Electronic message from Jordan Neel, Manager, Tariff Review Branch, Public Service Commission, to Robert Hedges, City Attorney, City of Russellville, Kentucky (June 19, 2001).

¹¹ Ordinance No. 99-8, Section I.

recognized the rates set forth in the cost-of-service study as the effective rates for wholesale water service to the Water Districts as of April 21, 2001.

DISCUSSION

The Commission has previously held that a municipal utility's proposed rate adjustment is void if filed without proper authorization from the city's legislative body.¹²

Our holdings were based upon KRS 96.170, which provides:

The legislative body of any city of the third class may, by ordinance, provide the city and its inhabitants with water, light, power, heat and telephone service, by contract or by works of its own, located either within or beyond the boundaries of the city; make regulations for the management thereof, and fix and regulate the prices to private consumers and customers.

Without such authorization, the filing has no legal standing and cannot be considered as an official action of the city.¹³

Although our previous decisions involved cities of the third class, statutory authority exists to extend our holding to other classes of cities. KRS 96.355(1)(a) provides:

The legislative body of **any city of the second, third, fourth, fifth or sixth class city** may by **ordinance . . . [p]rovide the city with water**, establish, regulate, and control public cisterns, hydrants and reservoirs, together with extension and appurtenances thereto, within or without the limits of the city, for fire protection and the use and convenience of its inhabitants [emphasis added].

The general organization of municipal government in this state, moreover, supports the position that legislative action is necessary prior to a revision in a municipal

¹² See City of Pikeville, Ky., Case No. 2000-540 (Ky. PSC Oct 8, 2001) at 3; Winchester Municipal Utilities, Case No. 96-616 (Ky. PSC Oct 3, 1997) at 6.

¹³ City of Pikeville, Ky. at 3.

utility's rates. Rate-making is a legislative act. See City of Mt. Vernon v. Banks, Ky., 380 S.W.2d 268 (1964); Com. ex rel. Stephens v. South Central Bell Tele. Co., Ky., 545 S.W.2d 927 (1976).¹⁴ Under the mayor-council plan,¹⁵ the form of municipal organization under which Russellville is governed, the legislative authority of the city is vested in an elected city council. KRS 83A.130(11). This council has the statutory responsibility of establishing by ordinance rules and regulations for the public health, safety and welfare and for providing for sufficient revenue to operate city government. KRS 83A.130(12). Only this council, exercising its legislative authority by ordinance, can revise the municipal utility's rates.

Opposing this line of argument, Russellville argues that municipal filings made with the Commission to comply with the holding of Simpson County Water District v. City of Franklin, Ky., 872 S.W.2d 460 (1994), do not require the enactment of a municipal ordinance. It notes that the holding of Simpson County Water District is silent on the necessity of an ordinance. It contends that, by conferring upon the Commission the authority to review and modify any proposed changes in municipal utility rates, Simpson County Water District effectively transferred rate-making authority to the Commission and effectively eliminated the need for any legislative action on the part of the municipality.

The Commission finds no merit in this argument. Prior to Simpson County Water District, cities routinely enacted ordinances to amend their rates to retail and wholesale

¹⁴ See also 12 Eugene McQuillan, The Law of Municipal Corporations §35.37 (3d. ed. 1996) (The fixing of rates for water supplied by a municipally owned utility is a legislative act, as is the fixing of rates of electric power supplied by a municipal utility.)

¹⁵ KRS Chapter 83A provides for three types of organization structures for municipalities: mayor-council plan; commission plan; and city manager plan. See KRS 83A.130 - .150. Russellville uses the mayor-council plan of organization.

customers.¹⁶ The Simpson County Water District decision did not dispense with any existing requirement; nor did it declare that a municipality could adjust its rates for utility service to public utilities without enacting an ordinance. It merely found that KRS 278.200 required that the Commission must review the proposed adjustment before such adjustment becomes effective.

Prior to presenting any proposed wholesale rate to the Commission, a city must meet the legal prerequisites necessary to adopt and implement a proposed rate. City officials must determine the proposed wholesale rate and authorize the presentment or filing of the proposed rate with the Commission. The principal treatise on municipal corporations underscores the need for such action:

Most of the powers exercised by municipal corporations require either an ordinance or a resolution. Such a corporation, while purely a governmental institution existing solely for the public good of the local community, is still a corporation and may legally act only as such. The governing body of a municipality acts in its official capacity only when it passes an ordinance or a resolution. All of its corporate and political powers, unless lodged elsewhere are vested in the council or governing legislative body In the performance, therefore, of its duties to validate its acts, ordinances are necessary unless the method of executing power is sufficiently prescribed by charter or legislative act to make it, or it is in its nature, a purely administrative duty.

5 Eugene McQuillan, The Law of Municipal Corporations §15.03 (3d. ed. 1996). If a city's legislative body is not required to take any action on the proposed rate, as Russellville argues, then actions having significant consequences on city finances may be taken by the most minor employee without any notice or knowledge of any of the

¹⁶ In Simpson County Water District, for example, the city of Franklin, Kentucky enacted three separate ordinances in which it adjusted its rates for water service to Simpson County Water District.

city's elected officials. This interpretation is at odds with the forms of municipal government established in KRS Chapter 83A.

Russellville next argues that, regardless of the need for an ordinance, the Commission's approval of the proposed rate is sufficient to render that rate lawful. This argument is flawed in two respects. First, we took no action to approve the rate. We entered no Order approving the rate.¹⁷ Second, before a party requests any relief from the Commission or seeks to invoke the Commission's authority, that party must be properly authorized to request the relief or seek the invocation of the Commission's authority. Without such authorization, the request is void.¹⁸

¹⁷ See Union Light, Heat and Power Co. v. Public Service Commission, Ky., 271 S.W.2d 361, 365 (1954) (the commission, like a court, acts and speaks only through its written orders.). Commission Staff's action in affixing a stamp on Russellville's cost-of-service study does not substitute for an Order of this Commission. Bee's Old Reliable Shows, Inc. v. Kentucky Power Co., Ky., 334 S.W.2d 765 (1960).

¹⁸ Not only did Russellville lack the authority to request any revision in its wholesale rate; it also failed to comply with the Commission's regulations regarding the filing of tariff changes.

We also note the initial lack of compliance with Commission rules regarding the filing of tariff changes. In Simpson County Water District the Kentucky Supreme Court expressly held that where contracts have been executed between a utility and a city KRS 278.200 is applicable and requires that by so contracting the City relinquishes the exemption and is rendered subject to PSC rates and service regulation. 472 S.W.2d at 363. Since Simpson County Water District, we have held that any rate schedules that a municipal utility submits must conform with Administrative Regulation 807 KAR 5:011. See, e.g., Submission of Contracts and Rates of Municipal Utilities Providing Wholesale Service to Public Utilities, Administrative Case No. 351 (Ky. PSC Aug. 10, 1994).

Administrative Regulation 807 KAR 5:011, Section 6, provides that [n]o tariff, or any provision thereof, may be changed, cancelled or withdrawn except upon such terms and conditions as the commission may impose and in compliance with KRS 278.180 and Sections 6 and 9 of this administrative regulation. Section 6 clearly provides that the proposed rate revision must be upon proper tariff sheets. Russellville's filing was not on tariff sheets nor did it contain specific notations to the revisions as Section 6 requires. KRS 278.180 requires a utility's notice to the Commission to state plainly the changes proposed to be made and the time when the changed rates will go into effect. The cost-of-service study and cover letter initially filed did not contain such statements. Administrative Regulation 807 KAR 5:011, Section 8, requires a utility to provide notice of any proposed rate change to affected customers. The record fails to indicate any evidence that the persons allegedly filing on behalf of Russellville complied with the requirements of this Section.

Finally, Russellville argues that any Commission declaration of the rate in question as void would constitute retroactive rate-making. As retroactive rate-making does not occur unless the rate being modified is an effective and valid rate, we find no merit to this argument. The rate in question is neither effective nor valid.

SUMMARY

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

1. Russellville's filing of March 22, 2002 is declared void.
2. Russellville shall refund to the Districts and to South Logan any monies billed and collected for water service rendered on or after April 21, 2001 and before the date of this Order that are in excess of the rate of \$1.55 per 1,000 gallons.
3. The Districts may dissolve the escrow accounts created to comply with the Commission's Order of October 5, 2001 and make unrestricted use of the proceeds of those accounts.

Done at Frankfort, Kentucky, this 3rd day of July, 2002.

By the Commission

ATTEST:

Deputy W. H. Fowler
Executive Director