

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE APPLICATION OF SHADOW WOOD )  
SUBDIVISION SEWER SERVICE, A JOINT )  
VENTURE OF FOURTH AVENUE CORPORATION )  
AND LONG CORPORATION D/B/A SHADOW ) CASE NO. 2001-00423  
WOOD SUBDIVISION SEWER SERVICE FOR AN )  
ADJUSTMENT OF RATES PURSUANT TO THE )  
ALTERNATIVE RATE FILING PROCEDURE FOR )  
SMALL UTILITIES )

O R D E R

On September 25, 2002, Shadow Wood Subdivision Sewer Service ( Shadow Wood ) petitioned for rehearing of our September 6, 2002 Order and for confidential treatment of certain time billing and fee records appended to its petition. No intervenor has filed a response to the petition with the Commission. By this Order, we deny the petition on all issues with the exception of the issue of residential equivalent billing.

Residential Equivalent Billing. In our Order of September 6, 2002, we accepted Commission Staff s recommendation that the Harbor Town Activity Center be allocated 15 residential equivalent units ( REUs ) instead of the 2 REUs that Shadow Wood proposed. Commission Staff asserted that its recommendation was based upon the billing records of Louisville Water Company ( LWC ), Harbor Town Activity Center s water supplier. In its petition, Shadow Wood states that, since LWC does not separately meter Harbor Town Activity Center s water service, Commission Staff s recommended allocation cannot be based upon actual usage and that Commission Staff misunderstood or misinterpreted the billing records. Shadow Wood further asserts

that the billing information upon which Commission Staff based its recommendation represents Harbortown Condominium Association, Inc.'s total water usage.

As neither Commission Staff nor any party to this proceeding has introduced LWC's billing records as evidence, we cannot assess accuracy of Shadow Wood's assertions. Likewise, we cannot be certain of Commission Staff's recommendations. It is clear that the number of REUs assigned will affect the rate and Shadow Wood's ability to collect its determined revenue requirement. In light of the uncertainty over the number of REUs, we find that rehearing should be granted on this issue.

Depreciation Expense. In our Order of September 6, 2002, we denied Shadow Wood's request for recovery of depreciation on contributed property through its rates. Shadow Wood objects to this denial and petitions for rehearing. We have addressed at length its arguments in support of recovery in our Order of September 6, 2002 and, therefore, find no need for further elaboration.<sup>1</sup> Shadow Wood raises no new issues and presents no additional evidence to support its position and rehearing on the issue should be denied.

Requested Litigation Surcharges. In our Order of September 6, 2002, we accepted Commission Staff's recommendation that Shadow Wood be permitted to

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<sup>1</sup> In its petition, Shadow Wood argues that our treatment of this issue conflicts with the holding of Public Service Commission v. DeWitt Water District, Ky., 720 S.W.2d 725 (1986). As the holding of that case is applicable only to non-profit water districts created pursuant KRS Chapter 74 and Shadow Wood is not such an entity, we find no conflict between our denial of recovery of depreciation expense in this case and the holding of DeWitt.

recover litigation costs of \$43,089.31 incurred in a recent proceeding<sup>2</sup> before this Commission be recovered as a surcharge over a 5-year period. In its petition for rehearing, Shadow Wood requests that recovery of litigation expenses of \$104,490 through a one-time charge.

With regard to the length of the proposed surcharge, Shadow Wood has presented no additional evidence to support its position for the assessment of a one-time assessment rather a monthly surcharge collected over a 5-year period. Our review of Shadow Wood's present arguments fails to reveal any viable reason for immediate recovery of these expenses. We, therefore, deny rehearing on this issue.

As to the amount of legal expenses recoverable through the surcharge, we deny Shadow Wood's petition on several grounds. First, we note that Shadow Wood never disputed Commission Staff's recommendations regarding legal fees or expenses. Having failed to object to these recommendations prior to the issuance of the Order of September 6, 2002, Shadow Wood has waived its right to object to the level of these fees in a petition for rehearing.

We also find that its petition as to the level of legal fees and expenses should be denied because its evidence cannot properly be considered. Several of the invoices that Shadow Wood presents in support of its petition existed before the hearing and could have been presented at hearing. As such evidence could have been offered had Shadow Wood exercised reasonable diligence, KRS 278.400 will not permit our consideration of it.

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<sup>2</sup> The Harbor at Harrods Creek Condominium Association v. Fourth Avenue Corp.-Long Corp. d/b/a Shadow Wood Sewer Service, Case No. 2000-00379 (Ky. PSC filed July 28, 2000).

Shadow Wood also takes issue with our failure to permit its recovery of certain litigation expenses related to expert witness fees. In its report, Commission Staff recommended that such fees be denied for lack of supporting evidence as to the reasonableness of the fees. After review of the evidence presented at hearing, we accepted Commission Staff's position on this issue. In its petition for rehearing, Shadow Wood again seeks to recover those witness fees, but provides no evidence to establish their reasonableness. In the absence of such evidence, we find that rehearing on this issue should also be denied.

Other Surcharges. Shadow Wood requests a one-time surcharge of \$763.26 per customer to correct a sludge problem in its treatment lagoon. In support of its surcharge, it presents citations from the Kentucky Natural Resources and Environmental Protection Cabinet and the Louisville and Jefferson County Division of Environmental Health and Protection. It further requests a surcharge to pay its current legal expenses and other outstanding obligations.

We deny Shadow Wood's request on several grounds. It was never properly raised in this proceeding. Shadow Wood did not request it in its application. When Commission Staff issued its report, Shadow Wood failed to object to the recommended rate or to propose additional surcharges. When it first raised this issue on the eve of the hearing in this matter, we properly refused to consider it. The issues may, however, be appropriately raised in a separate proceeding.<sup>3</sup>

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<sup>3</sup> See Kentucky-American Water Co., Case No. 2000-00120 (Ky. PSC Feb. 26, 2001) at 4-5; Louisville Gas and Electric Co., Case No. 90-158 (Ky. PSC Jan. 29, 1991) at 15-16.

Administrative Salary. In our Order of September 6, 2002, we limited Shadow Wood's recovery of its owner/operator's annual salary through rates to \$3,600. Arguing that its principal operating officer performs many functions for the company that a person employed in the same position by a utility of comparable size would not normally perform and that, consequently, a higher salary for Shadow Wood's principal operating officer is reasonable, Shadow Wood requests rehearing. As we addressed this issue at length in our Order and as the petition presents no new evidence or argument, we find rehearing on the issue should be denied.

Bookkeeping. In our Order of September 6, 2002, we calculated Shadow Wood's recoverable bookkeeping expense using a rate of \$10.00 per hour. At the hearing, Shadow Wood maintained that the rate was too low. In the petition for rehearing, Shadow Wood again maintains that the allowed rate is too low, but offers no new evidence or argument to support its position that could not have been supplied in the original hearing. Accordingly, we deny the petition for rehearing on this issue.

Insurance. In its application for rate adjustment, Shadow Wood listed its insurance expense as \$1,192.00. In its report, Commission Staff recommended the recovery of this amount through rates. Shadow Wood did not object to this recommendation nor did it present any evidence at hearing on this issue. We therefore accepted Commission Staff's recommendation. As part of its petition for rehearing, Shadow Wood has submitted three additional invoices that raised the actual premium amount to \$3,983.50. These invoices reflect an effective date prior to March 19, 2002, which was prior to the issuance of Commission Staff's report and the hearing. Given the effective dates of these policies, we conclude that Shadow Wood could have, with

due diligence, produced these policies at the hearing in this matter. Accordingly, we find that rehearing on this issue should be denied.

Request for Confidential Protection. Shadow Wood also requests the Commission to protect as confidential the billing records from its attorney. These records pertain to the legal services provided in the litigation between Shadow Wood and its intervening customers in this proceeding. Shadow Wood contends the information is exempt from public disclosure under KRS 61.878(1)(a) and (l).<sup>4</sup> Neither provision protects the information.

KRS 61.878(1)(a) exempts from disclosure information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy. This provision is intended to protect personal information when an individual's privacy interests in the information outweigh the public's interest in the information. Zink v. Commonwealth, Ky., 826 SW 2d 324 (1992). As a public utility, Shadow Wood's fees for legal services are subject to scrutiny, not only by this Commission, but also by its customers who ultimately pay for those services through the rates they are charged. Thus, the public's interest in the information is outweighed by the utility's privacy interest and the information is not entitled to protection under this statutory provision.

We find no basis for Shadow Wood's claim that KRS 61.878 (1)(l) entitles its billing records to confidential treatment. KRS 61.878(1)(l) protects information made confidential by enactment of the General Assembly. Shadow Wood contends that

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<sup>4</sup> In its Petition for Rehearing, Shadow Wood erroneously refers to KRS 61.878(1)(l) as KRS 61.878(1)(k).

Kentucky Rule of Evidence 503(b), which renders confidential communications between an attorney and a client made for the purpose of facilitating the rendition of professional legal services to the client, requires its legal fees be kept confidential. The Kentucky Supreme Court, however, has recognized that communications relating to the fiscal arrangements between an attorney and his client do not fall within the attorney-client privilege. Kentucky-Virginia Stages v. Tackett, 298 Ky. 78, 182 S.W.2d 226, 230 ([T]he terms and scope of his employment are not communications made to the attorney in his professional character by the client. ). See also United States v. Haddad, 527 F.2d 537 (6th. Cir. 1975) ([T]he amount of money paid or owed to an attorney by his client is generally not within the attorney-client privilege. ). The Attorney General has opined that such documents are not exempt from the Kentucky Open Records Act. OAG 95-ORD-18; OAG 92-14.

Based upon the above and being otherwise sufficiently advised, the Commission HEREBY ORDERS that:

1. Except as set forth in Ordering Paragraph 2 of this Order, Shadow Wood's Petition for Rehearing is denied.
2. Shadow Wood's Petition for Rehearing on the REUs for the Harbor Town Activity Center and Harbortown Condominium Association, Inc. is granted.
3. Within 20 days of the date of this Order, Shadow Wood shall file with the Commission and serve on all parties of record verified written testimony on the appropriate number of REUs to be allocated to Harbor Town Activity Center and Harbortown Condominium Association, Inc. Shadow Wood shall also file all support

documents with this testimony, including all LWC test-period billing records for the locations in question.

4. Shadow Wood's petition for confidential protection of the billing records from its attorney is denied.

Done at Frankfort, Kentucky, this 15<sup>th</sup> day of October, 2002.

By the Commission

ATTEST:



Executive Director