COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

RANDALL C. STIVERS	)	
	)	
COMPLAINANT	)	
	)	
v.	)	CASE NO. 2002-00045
	)	
HENRY COUNTY WATER DISTRICT NO. 2	)	
	)	
DEFENDANT	)	

O R D E R

On February 7, 2002, Randall C. Stivers filed a formal complaint against Henry County Water District #2 (HCWD#2). Complainant alleges that HCWD#2 is acting unreasonably and in contravention of its tariff and applicable law by requiring Complainant to sign a line improvement contract.[1] Allegedly, HCWD#2 requires the contract before it will certify[2] a plat for a proposed subdivision.

HCWD#2 is a water district created pursuant to KRS Chapter 74 and is subject to Commission jurisdiction. KRS 278.260 and KRS 278.170 imbue the Commission with jurisdiction over this complaint.

[1] This contract purportedly requires a developer to reimburse HCWD#2 for the cost of construction of previously existing water mains. Complaint at 5.

[2] The Shelby County Triple S Planning and Zoning Commission requires such certification before approving subdivision plats. Complaint at 3.

FACTS

Complainant is a real estate developer located in Shelbyville, Kentucky. On July 16, 2001, Complainant purchased certain property (Property) located in Shelby County within HCWD#2 s territorial boundaries. HCWD#2 is serving customers in the same area as the Property and has water mains running along all of the road frontage of the Property on Kentucky Highway 43, Magruder-Shipman Road, and Flood Road. Complainant wishes to subdivide the Property.

HCWD#2 s line along Kentucky Highway 43 is a part of a looped 6-inch line that was recently upgraded by an additional 6-inch water main on Magruder-Shipman Road. Complainant claims that HCWD#2 has sufficient capacity to serve the proposed lots that will be located along Highway 43 and Magruder-Shipman Road. Complainant claims that sufficient capacity will exist along Flood Road when HCWD#2, at Complainant s expense, installs an adequately sized main.

Shelby County has adopted countywide planning and zoning. Pursuant to KRS Chapter 100, real estate cannot be subdivided and sold without prior approval of a subdivision plat. The Shelby County Triple S Planning and Zoning Commission (Zoning Board) requires that the water utility in whose boundaries a proposed subdivision lies sign the subdivision plats, thus certifying that the water utility has sufficient capacity to serve the proposed subdivision.[3]

On or about January 25, 2001, the previous owners of the Property, the Pollards, submitted three plats to HCWD#2 and requested that HCWD#2 sign the plats to certify water availability to the subdivision. Allegedly, HCWD#2, rather than signing the plats,

[3] This is also contingent upon the appropriate equipment etc., being installed to ensure the capacity and ability to extend service.

sent a letter to the Pollards informing them that HCWD#2 would require them to pay $300 for a hydraulic feasibility study. The Pollards consented and sent HCWD#2 the requested funds. HCWD#2 also requested that the Pollards sign the line improvement contract, and the Pollards declined to do so. HCWD#2 did not sign the plats.

HCWD#2 had recently completed the Magruder-Shipman Line Improvement at a cost of $114,064, and this was the line from which Mr. Pollard s proposed subdivision would receive service. The proffered line improvement contract provided that, since Mr. Pollard s proposed real estate development would use 7.19 percent of the hydraulic capacity of the line improvement, he should pay 7.19 percent of the cost of the line improvement, which totaled $8201.20.

On or about October 29, 2001, Complainant, after purchasing the Property from the Pollards on July 16, 2001, submitted to HCWD#2 two more plats for its signature. Complainant alleges that all other applicable utilities had signed the plats before he submitted the plats to HCWD#2. HCWD#2 did not certify the plats because Complainant refused to sign the line improvement contract.

On or about January 7, 2002, Complainant submitted to HCWD#2 another set of revised plats. At this time Donald Heilman, HCWD#2 s authorized representative, allegedly told Complainant, This farm is in Shelby County and when it takes away the hydraulic pressure I have to answer to my customers here, and They [Public Service Commission] have said to sign these plats but I m not going to do it. [4] HCWD#2 denies that Mr. Heilman made these or similar statements to Complainant. Rather, HDWD#2

[4] Complaint at 5.

claims, Mr. Heilman was referring to a development in which a member of the Commission s Consumer Services Division staff, told Mr. Heilman to set meters.

Complainant claims that HCWD#2 is signing similar plats of subdivisions located in Henry County. Complainant claims that, as a result, HCWD#2 is unlawfully discriminating against [Complainant s] developments because they are in Shelby County. [5]

Complainant claims that he is ready, willing, and able to comply with all reasonable requirements for water service to the proposed developments. This compliance would include Complainant s paying for the cost of any subsequent extension and/or line improvements.

DISCUSSION

Because the signing of a line improvement contract is not listed in HCWD#2 s tariff as a condition for certifying building plans, the issue directly before us is whether HCWD#2 violates KRS 278.160 by requiring such condition.

HCWD#2 s Argument

HCWD#2 argues that in 1999, allegedly at the suggestion of the Commission, HCWD#2 began using special contracts instead of submitting an offsetting improvement tariff. HCWD#2 claims it did not file an offsetting improvement tariff because Administrative Case No. 375, concerning system development charges, was pending before the Commission.

HCWD#2 further claims compliance with KRS 278.160 based on Article 22 of its tariff, Rules and Regulations, which states that service will be provided if the District

[5] Id. at 6.

Commission determines it is feasible to serve such customer.[6] It is not, HCWD#2 argues, economically feasible to serve a development without requiring that its impact be reasonably offset.

HCWD#2 Tariff Sheet 5, Article 26, states, in pertinent part, that the Commission may contract with any person or entity for the sale of water . HCWD#2 argues that this portion of Article 26, combined with Article 22 of its tariff, gives it the authority to require these offsetting improvement contracts. HCWD#2 argues that by requiring these contracts, it is acting in the best interests of [its] customers[7] and respectfully submits that it is their responsibility and obligation to require developers to pull their own weight by means of offsetting improvement contracts.[8]

HCWD#2 claims that the Commission has approved seven such contracts, and that it ceased to offer the contracts when the Commission, in October 2001, sought to review the reasonableness of two of the special contracts. Consequently, HCWD#2 is no longer certifying any plats for proposed subdivisions because [a]pproving new subdivisions now without requiring developers to make offsetting improvements would be unfair to those developers who have already done so in accordance with the terms of the PSC-approved special contracts.[9]

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[6] Answer at 4, citing HCWD#2 Tariff Sheets 4 and 5, Article 22.

[7] Id.

[8] Id. at 4-5.

[9] Id. at 5.

The Filed Rate Doctrine

KRS 278.160 codifies the filed rate doctrine. It requires a utility to file with the Commission schedules showing all rates and conditions of service 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 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). See also, Boone County Sand and Gravel v. Owen County Rural Electric Cooperative Corp., 77 S.W.2d 224 (Ky.App., 1989).

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).[10] A similar rule applies to the published rate schedules of common carriers. See, e.g., Sallee Horse Vans, Inc. v. Pessin, 763 S.W.2d 149 (Ky.App., 1988).

The primary effect of KRS 278.160 is to bestow upon a utility s filed rate schedule the status of law. The rate when published becomes established by law. It can be varied only by law, and not by act of the parties. New York N.H. & H.R. Co. v. York and Whitney, 102 NE 366, 368 (Mass. 1913). While a utility may file or publish new rate schedules to change its rates pursuant to KRS 278.180, it lacks the legal authority to

[10] See also Haverhill Gas Co. v. Findlen, 258 N.E. 2d 294 (Mass. 1970); Laclede Gas Co. v. Solon Gershman, Inc., 539 S.W.2d 574 (Mo. App. 1976); Capital Properties Co. 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).

deviate from its filed rate schedule. It 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).

The Commission has examined HCWD#2 s rate schedule and finds that the only reference to a line improvement contract is a special contract filed with the Commission on March 21, 2000 and marked effective on March 31, 2000. The contract is labeled Line Improvement Contract and is between HCWD#2 and several developers. The terms of the contract provide that developers shall pay the cost of a line improvement on a road, after which HCWD#2 will assume ownership of the improved line. This differs from the contract HCWD#2 wants Complainant to sign as, in this case, the line improvement has already taken place.

HCWD#2 s Tariff Sheet 12B, which governs the extensions of service to developers, states, in pertinent part:

> Developers who construct water main extensions to proposed real estate subdivisions shall be assessed a fee equal to Henry County Water District s actual cost of designing, reviewing and inspecting such extensions.[11]

In Case No. 1997-00529,[12] the Commission examined certain of HCWD#2 s proposed tariff revisions that would establish (1) procedures to govern the construction and acceptance of water main extensions; (2) a fee for the design of water main extensions to proposed real estate subdivisions; (3) a fee for reviewing and inspecting water main extensions to proposed real estate subdivisions; (4) a fee for reviewing and

[11] HCWD#2 Tariff Sheet 12B.

[12] Case No. 1997-00529, The Tariff Filing of Henry County Water District No. 2 For Revisions Regarding Service Extensions (final Order entered July 31, 1998).

inspecting water main extensions to existing homes; and (5) a fee for its Standard Specifications and Drawings for Water Line Extensions. The Commission accepted all of HCWD#2 s proposed revisions except for a proposed section labeled Fees, which the Commission denied. The Commission denied all of the above-listed fees as unreasonable except for the fee for the design of water main extensions charged to proposed real estate subdivisions.

HCWD#2 s tariff also contains two attachments, which, presumably, were filed pursuant to Case No. 1997-00529. One attachment is titled Procedures and Requirements for the Development of Water Line Extensions to Be Connected to the Henry County Water District No. 2 System (Procedures and Requirements) and bears an effective date, according to the Commission s stamp, of May 7, 2000. The other attachment is titled Submittal Checklist for Application to the Henry County Water District No. 2 System (Submittal Checklist) and bears an effective date, according to the Commission s stamp, of May 7, 2000.

Procedures and Requirements serves as a guide for the extension of water lines to serve existing and new development and provides the policies and procedures as approved by the Henry County Water District No. 2. [13] Procedures and Requirements lists the general procedures to be followed by a developer who wishes to design, finance and construct a water line that will connect to, or become part of, the HCWD#2 system. [14] According to Procedures and Requirements, a developer must follow these procedures in order to connect to the HCWD#2 system.

[13] Procedures and Requirements for the Development of Water Line Extensions to be Connected to the Henry County Water District No. 2 System at 1.

[14] Id.

A developer desiring to connect to HCWD#2 must file an application with HCWD#2 and the application must include a written request to connect to the system. A developer must also develop and submit the plans for the development. The plans must comply with HCWD#2 s specifications for water line extensions. The Kentucky Division of Water must also approve these plans.

Procedures and Regulations contains a section titled Plat Certification Requirements. [15] This section states, in pertinent part, [i]t is the policy of Henry County Planning Commission that water certification on plats represent an unconditional guarantee of service. [16] Prior to certification, the developer must accomplish the following:

> 1. Obtain the approval of Commonwealth Technology, Inc. in accordance with current HCWD2 Standard Plans and Specifications and Procedures and Requirements for Water Line Extensions.
>
> 2. Obtain a project approval letter from the Kentucky Division of Water.
>
> 3. Post performance and payment bonds in the estimated amount of construction costs to ensure that HCWD2 can complete the project if the developer fails to install water lines in an acceptable and timely manner.[17]

The three criteria listed above are the only conditions for plat certification contained in HCWD#2 s tariff. No mention is made of any special contract as a prerequisite in order for HCWD#2 s to certify a plat.

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[15] Id. at 3.

[16] Id.

[17] Id.

Procedures and Requirements also lists the specific fees for which a developer will be liable. A developer must pay the actual cost of design review inspection of any extensions and must pay $30 for a copy of HCWD#2 s Standard Specifications and Drawings for Water Line Extensions.[18] These are the only specific fees mentioned in Procedures and Requirements or the Submittal Checklist.

No provision of HCWD#2 s tariff specifically addresses the refund policy regarding extensions to real estate developments, but Procedures and Requirements states, [w]hen determining any reimbursement required by Administrative Regulation 807 KAR 5:066, Section 11(3), this fee shall be included in the total cost[19] of the water main extension. [20] This section indicates that a developer shall be reimbursed for the cost of an extension to a real estate subdivision pursuant to the dictates of Administrative Regulation 807 KAR 5:066, Section 11(3).[21] Administrative Regulation 807 KAR 5:066, Section 11(3), makes no mention of paying for previous improvements to a main from which the extension shall attach.

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[18] Id. at 6.

[19] The cost of design, review, etc.

[20] Id. at 6.

[21] Administrative Regulation 807 KAR 5:066, Section 11(3), states:

> An applicant desiring an extension to a proposed real estate subdivision may be required to pay the entire cost of the extension. Each year, for a refund period of not less than ten (10) years, the utility shall refund to the applicant who paid for the extension a sum equal to the cost of fifty (50) feet of the extension installed for each new customer connected during the year whose service line is directly connected to the extension installed by the developer, and not to extensions or laterals therefrom. Total amount refunded shall not exceed the amount paid to the utility. No refund shall be made after the refund period ends.

Under the literal terms of HCWD#2 s filed rate schedules, Complainant is not required to pay any fee for already existing line improvements.

Special Contracts

Administrative Regulation 807 KAR 5:011, Section 13, authorizes a utility to enter into special contracts containing terms that differ from the tariffed conditions. It does not, however, permit a utility to impose untariffed rates, charges, or conditions of service over the customer s objections. Where the customer objects to the proposed special contract, a utility must provide utility service under the terms set forth in the utility s filed rate schedule.[22]

CONCLUSION

The filed rate doctrine clearly prohibits HCWD#2 from requiring that the line improvement contract be signed in order for HCWD#2 to certify any plats. HCWD#2 s tariff very clearly contains the requirements for plat certification, but the line improvement contract is not one of these requirements. If Complainant meets the criteria for certification as it is listed in HCWD#2 s tariff, HCWD#2 must certify Complainant s plats.

The Commission notes that its decision applies only to the issue of the line improvement contract as a prerequisite for plat certification. This decision does not address the issue of the amount HCWD#2 may assess or collect in the future.

IT IS THEREFORE ORDERED that HCWD#2 must certify Complainant s plats if the plats conform with HCWD#2 s duly filed tariff regarding plat certification.

[22] See Case No. 1997-00323, Burke Realty Company, Inc. v. Kentucky Turnpike Water District (Final Order dated September 1, 1999).

Done at Frankfort, Kentucky, this 14th day of June, 2002.

By the Commission

ATTEST:

Executive Director