

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

CRESTBROOK PROPERTIES, LLC)	
)	
COMPLAINANT)	
)	
v.)	CASE NO. 2001-00202
)	
NORTHERN KENTUCKY WATER DISTRICT)	
)	
DEFENDANT)	

O R D E R

On June 22, 2001, Crestbrook Properties, LLC (Crestbrook) filed a formal complaint against Northern Kentucky Water District (Northern Kentucky) alleging that Northern Kentucky s cross-connection policy violates KRS 278.170 by establishing an unreasonable difference or classification among residential customers. Northern Kentucky, Crestbrook says, assesses a special charge against multi-family residential units, but not against single-family residential units. Crestbrook also alleges that charging customers for certain backflow prevention devices constitutes charging an unpublished rate, which violates KRS 278.160.

Northern Kentucky, in its answer, asserts that classifying two types of residential units is reasonable. It also asserts that the special charge does, in fact, apply to all residential customers.

Crestbrook requests that the Commission either prohibit Northern Kentucky s cross-connection policy or require Northern Kentucky to modify its cross-connection policy to apply to single-family residences as well as to multi-family residences.

Crestbrook, which owns multi-family rental property in Northern Kentucky's service area, refused to install, at its own expense, backflow prevention devices on or near the service connections to its multi-family residence. Northern Kentucky sued Crestbrook in Kenton Circuit Court to obtain compliance with the policy. Northern Kentucky prevailed in circuit court on its summary judgment motion, and we subsequently held this case in abeyance pending review by the Kentucky Court of Appeals. The Court of Appeals recently held that Kenton Circuit Court incorrectly granted summary judgment while this case was pending before the Commission on an issue (unreasonable discrimination pursuant to KRS 278.170) that is within the exclusive original jurisdiction of the Commission. The Court of Appeals remanded to Kenton Circuit Court to await the Commission's decision.

DISCUSSION

Crestbrook alleges that although applicable law prohibits all cross-connections, Northern Kentucky enforces its policy only against certain customers. Currently, Northern Kentucky inspects only commercial, industrial, multi-family, and government structures for cross-connections. It does not inspect single-family residences. Crestbrook argues that there is no reasonable distinction between multi-family and single-family customers and that, therefore, Northern Kentucky is in violation KRS 278.170.¹

¹ KRS 278.170(1) states, in pertinent part: No utility shall, as to rates or service, give any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage, or establish or maintain any unreasonable difference between localities or between classes of service for doing a like and contemporaneous service under the same or substantially the same conditions.

Northern Kentucky argues that its practices are reasonable and that the distinction it has drawn is merely a means of identifying those services that are more likely to create a potential cross-contamination problem.² Northern Kentucky claims that this type of classification is allowed under KRS 278.030,³ and that the identification of these classes could have been stated in terms of meter size: the larger the meter, the greater the potential for cross-contamination. The affected classes have meters larger than single-family residences. Northern Kentucky also claims that its cross-connection policy does, indeed, apply to single-family residences, but that Northern Kentucky has first been concentrating on higher priority meters. At hearing, Northern Kentucky admitted that it has not imposed the requirement on single-family residences, and has not devised a plan to do so.

Crestbrook claims that one of the reasons for preventing cross-connections is to keep contaminants out of the water supply. Consequently, Crestbrook contends, the degree of hazard, as well as the type of cross-connection present, should be considered when requiring the installation of a backflow prevention device.

Crestbrook notes that Northern Kentucky's tariff does not mention degree of hazard as a factor in determining the urgency of protection against contamination.

² Northern Kentucky's Answer at 2.

³ KRS 278.030 states: (1) Every utility may demand, collect and receive fair, just and reasonable rates for the services rendered or to be rendered by it to any person. (2) Every utility shall furnish adequate, efficient and reasonable service, and may establish reasonable rules governing the conduct of its business and the conditions under which it shall be required to render service. (3) Every utility may employ in the conduct of its business suitable and reasonable classifications of its service, patrons and rates. The classifications may, in any proper case, take into account the nature of the use, the quality used, the quantity used, the time when used, the purpose for which used, and any other reasonable consideration.

Moreover, Crestbrook argues that Northern Kentucky does not explain why meter size increases the probability of harmful contamination through cross-connections.

The Cross-Connection Policy

A cross-connection is defined as:

[A] physical connection or arrangement between two (2) otherwise separate systems, one (1) of which contains potable water and the other being either water of unknown or questionable safety, or steam, gas, or chemicals, whereby there may be flow from one (1) system to the other, the direction of flow depending on the pressure differential between the two (2) systems.⁴

Northern Kentucky adopted its cross-connection tariff provision⁵ in response to the Natural Resources and Environmental Protection Cabinet's Administrative Regulation 401 KAR 8:020,⁶ which prohibits cross-connections for all public water systems. Northern Kentucky's cross-connection policy is as follows:

(1) All new commercial, industrial, multi-family, and governmental accounts will be required to meet Water District Standards for cross-connection control upon notification from the Water District. Water service for new commercial and industrial accounts will not be turned on until the Water District requirements are met.

(2) All existing commercial, industrial, multifamily and governmental accounts will be required to meet the Water District Standards for cross-connection control upon

⁴ 401 KAR 8:010(32).

⁵ Filed with the Commission on July 1, 1997.

⁶ 401 KAR 8:020(2) provides: All cross-connections are prohibited. The use of automatic devices, such as reduced pressure zone back flow preventers and vacuum breakers, may be approved by the cabinet in lieu of proper air gap separation. A combination of air gap separation and automatic devices shall be required if determined by the cabinet to be necessary due to the degree of hazard to public health. Every public water system shall determine if or where cross-connections exist and shall immediately eliminate them.

notification from the Water District. Existing accounts will be prioritized by the largest meter size and consumption for that meter size, inspection will start with the largest meters and consumption.⁷

Northern Kentucky's tariff also states that [n]o person shall cause a cross-connection to be made unless the connection and operation of same meets the Water District Standards for cross-connection control.⁸ [A]ny person who now has cross-connections in violation of this policy shall be allowed a reasonable time to comply with the provisions of this policy,⁹ and the requirements contained herein shall apply to all premises served by Northern Kentucky Water Service District.¹⁰

One method by which to combat the dangers of cross-connections is by the installation of backflow prevention device. Another method is to eliminate the cross-connection either by installing an air-gap separation or by physically eliminating the connection. According to Northern Kentucky's cross-connection policy, the backflow prevention devices are located on the customer's side of the meter.

The customer not only must purchase and pay for installation of the backflow prevention device, the customer must also pay to have it inspected every year and then certify to Northern Kentucky that the device is functioning correctly.¹¹

⁷ Northern Kentucky Water District's Tariff Sheet No. 28, Section XXIII, Subsections 1 and 2.

⁸ Id. at Sheet No 29.

⁹ Id. at Sheet No. 30.

¹⁰ Id. at Sheet No. 31.

¹¹ In charging the customer for the cost of the backflow prevention device, Northern Kentucky is merely passing through the cost of the device. Accordingly, we find no violation of KRS 278.160.

Discrimination Between Multi-Family Residential and Other Residential Structures

Northern Kentucky defines a multi-family structure as a structure containing more than two residences. To arrive at this definition, Northern Kentucky relied upon the Kentucky Revenue Cabinet's definition of a multi-family residence as used for tax purposes.

Attached to Northern Kentucky's answer are excerpts from several documents to which Northern Kentucky refers in supporting its determination that multi-family residences pose a higher degree of hazard than single-family residences and duplexes. These documents are the Federal Environmental Protection Agency's (EPA) Cross-Connection Control Manual, Recommended Practice for Backflow Prevention and Cross-Connection Control from the AWWA Manual and the Manual for Cross-Connection Control, Foundations for Cross-Connection Control Research, University of Southern California.

The documents demonstrate, however, that the size of the meter is not a factor to be considered when defining degrees of hazard. Instead, the appropriate factors are hazardous use and actual cross-connections.

We also have reviewed the cross-connection policies of other water utilities in Kentucky. They do not differentiate between single-family and multiple-family residences.¹² The general rule is that residential structures are treated in the same

¹² See, e.g., Tariff of Morgan County Water District, A Resolution Establishing a Program to Protect the District's Water Supply by Controlling Backflow and Cross-Connections, Section 4(a), Buildings used for habitation or occupancy shall be considered as residential buildings. Residential service connections shall be considered as low hazard applications and should have at a minimum a dual check valve backflow preventer. See also, Bath County Water District's tariff, which contains similar language.

manner. A cross-connection device is required when the meter is replaced, the service line is moved, or the utility becomes aware that a cross-connection exists. West Shelby County Water Districts and Todd County Water Districts standard service connections contain backflow prevention devices.

The EPA manual on cross-connection policies that Northern Kentucky provided to the Commission enumerates the elements to be contained in an action plan. Specifically, the manual states that a utility should:

(9) Establish a residential backflow protection program that will automatically insure that a residential dual check backflow device is installed automatically at every new residence.

(10) As water meters are repaired or replaced at residences, insure that a residential dual check backflow preventer is set with the new or reworked meter. Be sure to have the owner address the thermal expansion provisions.¹³

We conclude that there is no reason to classify multi-family residences differently from single-family residences for cross-connection purposes. No evidence supports a conclusion that multi-family residences present any greater threats than do single-family residences. The classification is arbitrary and puts a significant burden on the owners of multi-family residences that owners of single-family residences need not bear, despite the engagement of both in similar, low-hazard activities.¹⁴ Pursuant to

¹³ Cross-Connection Control Manual, U.S. Environmental Protection Agency, Office of Water (WH-550A. EPA 570/9-89-007), June 1989 at 31.

¹⁴ The American Water Works Association lists apartments as a Level II hazard that requires a backflow preventer. This same list of hazards, however, also lists multi-storied buildings as a Type II hazard. Recommended Practice for Backflow Prevention and Cross Connection Control, AWWA Manual M14, Second Edition 1990. This indicates that any building containing more than one story should be required to install a backflow prevention device as listed before. That would mean that a large number of 2-story or more single-family residences should be treated the same as apartments.

KRS 278.170, Northern Kentucky should amend its tariff to treat residential structures equally.

We do not imply by this Order that Northern Kentucky should not be allowed to require immediate installation of a backflow prevention device if it discovers that cross-connections exist within a structure. It must, therefore, enforce its right of entry to determine if cross-connections exist. If a customer refuses inspection, Northern Kentucky may, pursuant to 807 KAR 5:006, Section 14, disconnect the customer's service.

Further, it is not unreasonable to require a customer to install and maintain a backflow prevention device if that device is required because of a cross-connection or other hazard on that customer's system. Northern Kentucky is cautioned, however, that policies in regard to payment must also conform with KRS 278.170.

At hearing, Walter Broughman testified that a dual-check valve device is sufficient to protect against backflow from a residential structure. Moreover, this device can be placed with the meter, facilitating access and allowing Northern Kentucky to inspect the device with ease. These devices are significantly less expensive than the double-check valve assembly Northern Kentucky currently requires Crestbrook to install. Nothing in the record indicates that the dual-check device is insufficient to combat the degree of hazard normally presented by a residential building.¹⁵

¹⁵ Because of the different types of devices available and the fluctuation in costs of these devices, it would not be reasonable to require Northern Kentucky to publish the exact costs of each device in its tariff.

IT IS THEREFORE ORDERED that:

1. Northern Kentucky shall amend its cross-connection policy to reflect a reasonable and nondiscriminatory cross-connection policy that applies equally to both single-family and multi-family residences.

2. Within 60 days of the date of this Order, Northern Kentucky shall file with the Commission its amended cross-connection policy that reflects the findings and conclusions contained herein.

3. Within 20 days of the date of this Order, Northern Kentucky may request an informal conference with Commission Staff to discuss revisions to the cross-connection policy.

Done at Frankfort, Kentucky, this 17th day of June, 2003.

By the Commission

ATTEST:


Executive Director