COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ROY GAINES WALTON AND GERALD WALTON	)	
COMPLAINANTS	)	
V.	)	CASE NO. 2005-00136
KENTUCKY UTILITIES COMPANY	)	
DEFENDANT	)	

O R D E R

On March 28, 2005, Roy and Gerald Walton ("Complainants") filed with the Commission a formal complaint against Kentucky Utilities Company ("KU"). The complaint alleged that KU was improperly holding Complainants liable for meter tampering and diversion of service that occurred at their rental property served by KU. Complainants ask that the Commission order KU to refund the charges assessed to them as well as reject certain tariff provisions that KU has proposed.

In its answer, KU asserts that, because there was no active account at the rental property at the time the meter tampering occurred, it properly billed Complainants for the meter tampering charges pursuant to the provision titled "Protection of Company's Property" on Original Sheet 82.1 of its tariff. The tariff provision, in pertinent part, provides that, "[u]pon the absence of an active account, the property owner assumes responsibility for any consumption and the Company's property and service."

A formal hearing was held in this and other related cases[1] at the Commission's offices on May 30, 2006. Following the hearing, both parties filed briefs. The record in this case is complete and it is ripe for a decision.

BACKGROUND

On or about December 13, 2004, Roy Walton requested that the account for KU's electric service be taken out of his name at 832 Ward Avenue, Lexington, Kentucky. The purpose of his request was to allow a tenant at the property to assume service in her name. Mr. Walton evicted the tenant in January 2005. On January 27, 2005, Mr. Walton contacted KU to request that the account for electric service be transferred back to his name. A KU representative informed him that there had been no active account at 832 Ward Avenue since December 14, 2004 and that no request to initiate service had been received.

KU discovered that the electricity had been turned on illegally. The meter from 836 Ward Avenue had been removed and placed into the meter box at 832 Ward Avenue. The meter base at 832 Ward Avenue had to be replaced due to damage.

Subsequently, another tenant occupied the property. Upon the tenant's departure in May 2005, Mr. Walton contacted KU to request transfer of service into his name. KU refused to do so until Mr. Walton paid $351.30 for the previous diversion of service and damage to the meter base. Mr. Walton refused to pay, arguing that he was not liable for the criminal acts of a third party.

[1] Case No. 2004-00499, Ada Mae Clem v. KU; Case No. 2005-00118, Jill and Robert Wade v. KU; Case No. 2005-00423, Robert H. Noe and Dan L. Barnett d/b/a/ B & D Rentals v. KU; Case No. 2004-00450, John Yuen v. Louisville Gas and Electric Company ("LG&E"); Case No. 2004-00497, Curtis E. White v. LG&E; Case No. 2005-00099, Norman L. Dennison v. LG&E; Case No. 2005-00137, Donald Marshall v. LG&E; Case No. 2005-00182, Maria L. Wilson v. LG&E.

Pursuant to the provision titled "Protection of Company's Property" on Original Sheet 82.1 of KU's tariff, KU assessed Complainants for meter tampering. The Complainants were required to pay charges for meter tampering and diversion of service before service was restored to the rental property. Complainants paid the charges under protest and filed their complaint with the Commission.

Prior to the hearing, KU filed testimony with the Commission discussing the purpose behind the "Protection of Company's Property" provision in its tariff. KU conceded that the application of the tariff provision could lead to unreasonable results. In response to this concern, and to concerns raised by the Attorney General and Commission Staff, KU attached to Sidney L. "Butch" Cockerill's prefiled testimony ("Cockerill Testimony") proposed amendments to the "Protection of Company's Protection" provision. Complainants objected to the proposed language as it still held the property owner potentially liable for actions of a third party.

DISCUSSION

On July 1, 2004, KU's current tariff became effective pursuant to a settlement agreement entered into between the parties in Case No. 2003-00434.[2] In that case, KU amended its tariff to include a new provision on Original Sheet 82.1 of its tariff titled "Protection of Company's Property" and provides as follows:

> Original Sheet 82.1
> Protection of Company's Property.
> Customers will be held responsible for tampering, interfering with, breaking of seals of meters, or other equipment of the Company installed on Customer's premises and will be held liable for same according to law. . . . *Upon absence of an active account, the property owner assumes responsibility for any consumption and the Company's property and service*. (emphasis added).

[2] Case No. 2003-00434, An Adjustment of the Electric Rates, Terms, and Conditions of Kentucky Utilities Company, (Ky. PSC Jun. 30, 2004).

KU is using this tariff provision to assess a property owner a charge for tampering and/or diversion of service that occurred at the owner's property when there was no active account at the property. While this applies to any property owner, its *de facto* application has been to assess a landlord charges for a current or previous tenant's theft of service and/or meter tampering. Prior to July 1, 2004, KU, in order to collect charges for meter tampering and/or diversion of service was to either seek recompense in a court of competent jurisdiction,[3] or, if KU knew the responsible party and the party had an active account, KU could assess that account and, if the customer refused to pay, attempt to collect through either small claims court or a debt collection agency.

Beginning in mid-November 2004, a number of complaints were filed against LG&E and KU. The complaints involved the tariff provision allowing LG&E and KU to assess a property owner, in the absence of an active account at the property, for diversion of service and tampering charges that occurred at the property. The tariff provision became effective with the filing of LG&E's and KU's July 1, 2004 tariffs. The complaints primarily involved claims similar to the ones raised in the present case.

KU stated that there had been an increase in theft of service cases and that the tariff provision implemented in Case No. 2004-00433 was an attempt to mitigate the financial impact of the theft on other ratepayers.[4] KU claimed that, because of the high cost of forcing collections from the parties responsible for the meter tampering and/or

[3] Transcript of Evidence ("TR"), Case No. 2005-00136, at 69.

[4] LG&E and KU estimated that they lose approximately $350,000 to $500,000 a year to diversion of service. TR, Case No. 2005-00136, at 68. They also estimate that they experience approximately 14,000 meter tampering/diversion of service cases in a year. Cockerill Testimony at 2.

diversion of service and pursuing those claims in court, the tariff provision was a more efficient and cheaper way to obtain payment.[5] KU also stated that it inserted the tariff provision because the burden of proof in proving who was responsible for theft of service and/or tampering charges in these situations was too difficult.[6]

The tariff language existing prior to July 1, 2004 stated, in pertinent part, that, "'Customers will be responsible for tampering, interfering with, breaking of seals of meters or other equipment of the Company . . . and will be held liable for the same according to law.'"[7] KU's witness testified that he believed "this verbiage and the 'benefit-of-service' logic reasonably implied that the property owner should be the responsible party in the absence of an active account."[8] KU described "benefit-of-service logic" as "the property owner is the one receiving the benefit of service either from maintenance or in enhancing the value of his or her property"[9] and "they reap the benefit of any income derived from the property and should bear the risk."[10]

Commission Staff met twice with representatives from LG&E, KU,[11] and the Attorney General ("AG"), who had been granted intervention. The parties discussed the need for changing the current language of the tariff provision. At the second

[5] Informal Conference Memorandum dated May 17, 2005 in Case Nos. 2004-00450, 2004-00451, 2004-00497, 2004-00499 and 2005-00010 at 2.

[6] Id.

[7] Cockerill Testimony at 2.

[8] Id.

[9] Id.

[10] Id. at 3.

[11] LG&E and KU are subsidiaries of the same parent company and maintain similar tariffs for electric service.

conference, LG&E and KU presented to Commission Staff proposed tariff language drafted with the assistance and approval of the AG. The proposed provision sought to provide better notice to a property owner regarding liability as well as to give a property owner an opportunity to provide to LG&E and KU the identity of the person(s) who should properly be assessed. The proposed tariff provision is as follows:

> Upon the absence of an active account should tampering, interfering, or breaking of seals on the meter or other Company equipment occur, the Company shall notify the property owner of such. The property owner shall have seven (7) business days from the date of the notification to take corrective action acceptable to the Company in its sole discretion and, if applicable, have the responsible party apply for service with the Company and/or reimburse the Company for all costs associated with the incident. The action shall relieve the landlord from financial responsibility resulting from such tampering. The notification is made via a letter sent by regular mail, notification shall be deemed to have been made three (3) days after such letter is mailed. Should the property owner fail to take these corrective measures within seven (7) business days after notification, the property owner will assume financial responsibility for such tampering.

Although no case law, statute, or regulation directly addresses this issue, the Commission has long held that one party cannot be held liable for a third party's consumption of service or a utility's charges. The Commission established its existing policy regarding property owner liability in Case No. 9383.[12] In that case, the Commission held that the user of the services was solely liable for the payment of the water charges. The Commission reasoned that, absent a statute or special agreement,

[12] Case No. 9383, An Investigation Into the Rates and Charges of Hardin County Water District No. 1, (Ky. PSC Aug. 26, 1985).

a public utility cannot impose liability for utility charges incurred upon one other than the user or one who contracted for the service.[13]

The Commission reaffirmed its Case No. 9383 findings in Case No. 2003-00168.[14] In that case, Jessamine South-Elkhorn sought to amend its water user agreement and unilaterally require joint liability for the landlord and lessee for water charges delivered to the lessee's address. The Commission found that, "a jurisdictional utility may not unilaterally impose, directly or indirectly, as a condition of service, the debt of the user of such service, including, but not limited to, tenant/lessee, on another including, but not limited to, landlord/owner."

KU claims that it is pursuing property owners for the charges because it does not want to pass on the charges to its existing customer base. KU testified that the annual theft of service charges range between $350,000 and $500,000 annually.[15] LG&E and KU have approximately one million customers. Averaged out among its customer base, the annual charge for theft of service, if passed on, would amount to an additional $.04 a month. This charge does not appear to justify amending the Commission's current policy regarding property owner liability.

[13] 64 Am.Jur.2d, Public Utilities, Section 60 (1972). Kentucky law does allow a municipal water utility to hold a landlord liable for charges incurred at a rental property. Puckett v. City of Muldraugh, 403 S.W.2d 252 (Ky. 1966). The United States Court of Appeals for the Sixth Circuit, however, found that a similar requirement in Columbus, Ohio was "a debt collection scheme 'that divorces itself entirely from the reality of the legal accountability for the debt involved.'" Golden v. City of Columbus, 404 F.3d 950, 962 (6th Cir. 2005) (citations omitted).

[14] Case No. 2003-00168, The Filing of Jessamine-South Elkhorn Water District to Revise its Water User Agreement, (Ky. PSC Feb. 18, 2004).

[15] TR at 68.

Similarly, the Commission does not believe that the "benefit-of-service logic" provides any reason for amending its policies. KU argues that because the property owners "reap the benefit" of the property, they should bear the risk. However, this "logic" shifts to the property owner KU's obligation has to protect its property. The only way a property owner could live up to KU's expectations would to be to post a guard at the meter box at all times.[16] KU's proposed tariff amendment also does not provide any reasons why the Commission should amend its current policy regarding property owner liability. While the proposed amendment provides for a rebuttable presumption regarding a property owner's liability, the property owner retains a possible liability if he does not take the necessary action prescribed by KU. The property owner's recourse at that point is to file a formal complaint with the Commission.

Pursuant to KRS 278.280, the Commission, upon its own motion or on complaint brought pursuant to KRS 278.260, and after a hearing, may find that any practice of a utility is unreasonable. After making such a finding, the Commission will prescribe the reasonable practice.

Based on the foregoing, the Commission finds the following:

1. The provision "Protection of Company's Property" on Original Sheet 82.1 of KU's tariff is unreasonable.

2. The proposed tariff amendment, if accepted, would be an unreasonable practice.

3. The current tariff provision, as applied to the facts of Complainants' case, leads to an unreasonable result.

[16] TR, Case No. 2005-00118, at 10.

IT IS THEREFORE ORDERED that:

1. KU shall credit Complainants' account for any meter tampering/diversion of service charges that Complainants have paid.

2. The provision titled "Protection of Company's Property" on Original Sheet 82.1 of KU tariff is stricken as unreasonable.

3. Within 30 days of the date of this Order, KU shall file revised tariff sheets consistent with the Commission's findings.

4. This is a final and appealable Order.

Done at Frankfort, Kentucky, this 18th day of October, 2006.

By the Commission

ATTEST:

Executive Director