

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF ESTILL)	
COUNTY WATER DISTRICT NO. 1 FOR A)	CASE NO. 2019-00119
SURCHARGE TO FINANCE WATER LOSS)	
CONTROL EFFORTS)	

**CLARIFICATION OF REQUESTED RELIEF AND
OBJECTION TO ORDER OF JUNE 26, 2020**

Estill County Water District No. 1 (“Estill District”) supplements its Motion for Declaratory Order to clarify the relief requested and objects to the Commission’s Order of June 26, 2020.

Clarification of Requested Relief

Estill District’s requested relief is not intended to prevent or frustrate the Commission’s “continued oversight” of surcharges.¹ Without a final decision on its proposed surcharge rate, Estill District’s continued collection of the surcharge proceeds is of limited value. Until the surcharge rate is recognized as final and no longer subject to the refund provisions of KRS 278.190(2), there is no certainty of Estill District’s right to retain any surcharge proceeds – even if it complies with all terms set forth in its tariff. If the Commission finds the rate is unreasonable, **all proceeds must be refunded**. Under the current circumstances, Estill District cannot use the revenue stream from the surcharge rate as collateral for a loan to finance water loss reduction projects. A prospective lender has no certainty that the Commission will approve the surcharge rate until a final decision

¹ Order of June 26, 2020 at 1.

has been entered. Consequently, a prospective lender will be unlikely to lend funds based upon the surcharge revenue. That certainty is the only relief that Estill District seeks with its Motion.²

By way of review, Estill District in its Motion for Declaratory Order sought a ruling from the Commission that the proposed surcharge rate, which the Commission authorized Estill District to collect subject to refund pending final decision, has become final and is no longer subject to the refund provision of KRS 278.190(2) because no final decision on the proposed rate was issued within ten months of the proposed rate's filing. Estill District did not seek a declaration that the Commission lacks the statutory authority to monitor the collection and use of the surcharge proceeds or to order a refund of collected surcharge proceeds under other circumstances.

In its Order of June 26, 2020, the Commission states that "Estill District was granted a surcharge to address its ongoing efforts to reduce water loss in Case No. 2019-00119 and to collect, subject to refund, the granted surcharge amounts." While the Commission had previously authorized Estill District to collect the proposed rate subject to refund, it made very clear in its Order of August 29, 2019 that final approval of the rate had not been granted. It specifically found:

Allowing Estill District to collect the proposed surcharge subject to refund is reasonable and will allow customers to be protected **in the event the surcharge is not approved**; it also will allow Estill District to begin accumulating capital reserves to address its water loss issues **in the event the surcharge is approved**.

Order at 3 (emphasis added). The Commission permitted the collection of the proposed surcharge rate pending completion of its review of the reasonableness of the rate. If, at the conclusion of this review, the Commission found the proposed rate was unreasonable, Estill District would be

² While the proposed surcharge rate permits the refund of any unused proceeds and any proceeds used without Commission approval, most lenders operate on the presumption that a water district – a political subdivision of the Commonwealth – will comply with the law and orders of the state regulatory agencies.

required to refund some or all of the collected surcharge proceeds regardless of its compliance with the proposed rate's terms and conditions and the Order of August 29, 2019.

KRS 278.190(2) authorized the Commission's action. It permits the Commission to suspend the operation of a proposed rate for a period of time up to five months, and, if the Commission has not entered a decision by the end of the suspension period, permits a utility to place the proposed rate into effect subject to refund. KRS 278.190(2) also authorizes the Commission to permit a rate "to become effective under terms and conditions as the commission may, by order, prescribe."³

The Commission's subsequent actions further indicate that final approval of Estill District's proposed surcharge rate had not been granted. Pursuant to the terms of the Order of August 29, 2019, Estill District filed a tariff sheet that set forth the proposed surcharge rate's terms and conditions and expressly provided that "[c]ollection of this surcharge is subject to refund pending the issuance of a final order in Case No. 2019-00119."⁴ The Commission accepted the tariff sheet without comment or objection.

On October 10, 2019, the Commission issued a request for information to Estill District seeking information regarding the proposed surcharge rate. As issuing a final decision on a proposed rate and then immediately inquiring about the reasonableness of that rate is contrary to the Commission's longstanding procedures and common sense, the act of issuing the request indicates the proposed surcharge was still under review and not final.

³ In its Order of August 29, 2019, the Commission does not specifically refer to KRS 278.190(2). Kentucky courts, however, have held that the Commission's powers are "purely statutory" and that "it has only such powers as are conferred expressly or by necessity or fair implication" and "cannot add to its enumerated powers." *Boone County Water and Sewer District v. Public Service Commission*, 949 S.W.2d 588, 591 (Ky. 1997) See also *Croke v. Public Service Commission of Kentucky*, 573 S.W.2d 927 (Ky. App. 1987); *South Central Bell Telephone Co. v. Utility Regulatory Commission*, 637 S.W.2d 649 (Ky. 1982). KRS 278.190 provides the only statutory procedure under which a utility may propose a change in its existing schedule of rates and the Commission may review such change.

⁴ Tariff of Estill County Water District No. 1, PSC No. 4, Original Sheet 1.1 (filed Sep. 24, 2019). This sheet and the Commission's letter of acknowledgement are attached.

The phrasing of the requests also indicates a lack of finality. The Request notes that the proposed “three-year surcharge, **if approved**, will produce \$479,400 in income.”⁵ It questions Estill District’s use of “the **proposed** surcharge funds for any other projects.”⁶

While the Commission possesses plenary power over utility rates and service, KRS 278.190(3) limits this power by placing strict time limits on its review of a proposed rate. KRS 278.190(3) provides:

At any hearing involving the rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the utility, and the commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible, and **in any event not later than ten (10) months after the filing of such schedules** [emphasis added].

The Commission has previously acknowledged that KRS 278.190(3) requires “the Commission [to] complete its investigation and render a final decision within ten months of the filing of the proposed rate” and that “[t]he Commission’s failure to render a decision within this period will result in the proposed rates becoming effective.”⁷

KRS 278.190(3) and Commission precedent make clear that Estill District’s proposed rate is final and is no longer subject to the refund provisions of KRS 278.190(2). More than ten months have elapsed since Estill District’s proposed rate was filed on August 1, 2019 and the Commission has not yet rendered a final decision. By failing to issue a final decision within the statutorily-required time period, the Commission has lost the authority **under KRS 278.190(2)** to order a refund of surcharge proceeds.

⁵ Commission Staff’s First Request for Information to Estill County Water District No. 1, Item 2(c) (emphasis added).

⁶ *Id.* at Item 3 (emphasis added).

⁷ *Proposed Adjustment of The Wholesale Water Service Rates of the City of Falmouth*, Case No. 2006-00403 (Ky. PSC June 27, 2007) at 1-2.

The absence of a timely decision on the surcharge rate, however, does not prevent the Commission from directing the refund of surcharge proceeds or to otherwise supervise their collection and use. In its tariff, Estill District has affirmatively proposed provisions restricting its use of surcharge proceeds and promoting transparency and accountability in their use. These tariff provisions, coupled with the Commission's statutory powers, allow for extensive Commission supervision of the surcharge proceeds' collection and use. KRS 278.160(2) requires Estill District to comply with these tariff provisions. Should Estill District fail to do so, KRS 278.040(3) empowers the Commission to enforce Estill District's compliance. Moreover, KRS 278.180 prevents Estill District from amending or revising these terms without 30 days' notice to the Commission and KRS 278.190 permits the Commission to review and reject those revisions. Finally, if the Commission at any time determines that circumstances render the surcharge rate unlawful or unreasonable, KRS 278.270 permits the Commission to terminate its assessment and collection.

The request relief does not interfere with the Commission's ability to supervise the collection and use of surcharge proceeds, exercise its statutory authority over rates or to otherwise protect ratepayers. Accordingly, Estill District requests that the Commission grant its Motion and acknowledge by order that the proposed surcharge rate has become final and is no longer subject to the refund provisions of KRS 278.190(2).

Objection to Order of June 26, 2020

Estill District objects to the Commission's Order of June 26, 2020 in which five water utilities were invited to submit written briefs on Estill District's Motion for Declaratory Order. The only question raised by the Motion is whether the proposed surcharge rate is final and no longer subject to the refund provisions of KRS 278.190(2) due to the lack of a final decision. None of the

invited utilities have any interest in the proposed surcharge rate. None are customers of Estill District. None are currently paying the rate nor are they likely to ever pay the rate.

That the invited utilities current assess a surcharge or have applied to the Commission for a surcharge within the last year does not create an interest in Estill District's requested. Of the four invited utilities that are currently assessing a surcharge,⁸ three received approval to assess a surcharge as a result of a final Commission decision on the utility's general rate adjustment application. The other utility was permitted to assess a surcharge by interim order and that approval was subsequently affirmed by the Commission's final decision on the utility's rate application. In each case, a final decision was entered within ten months of the filing of the utility's rate application. Therefore, the Commission's decision on the question of the effect of its failure to enter an order on Estill District's proposed surcharge rate within ten months of the surcharge rate's filing will have no effect on these utilities or the surcharges that they assess.

For the same reason, the Motion does not raise any question regarding "the procedural application" or continued Commission oversight of the invited utilities' surcharges. For each of those utilities, the Commission imposed in its final Order, issued within the time period prescribed by KRS 278.190(3), the conditions related to the assessment, collection, reporting and recording of those utilities' surcharges. Estill District has not questioned the lawfulness or reasonableness of those Orders nor has it raised any issue regarding the conditions contained in those Orders or **the Commission's efforts or ability to enforce the terms of those final Orders**. Estill District's Motion instead concerns an instance where a final Order has not been issued within the prescribed time period.

⁸ The Commission has not yet approved a surcharge for Farmdale Water District. *See Electronic Alternative Rate Adjustment Filing for Farmdale Water District*, Case No. 2020-00021 (Ky. PSC filed Jan. 22, 2020).

Estill District has not questioned or challenged Commission supervision of the collection and use of surcharge proceeds or the Commission's authority to require refunds when Commission-imposed conditions are not met. While the Commission's failure to timely issue a final Order in this proceeding deprives it of the authority to issue an Order containing such provisions in this proceeding, Estill District's surcharge rate contains those provisions and the Commission has authority under KRS 278.040 and KRS 278.270 to enforce those provisions and, if necessary, terminate the surcharge and require refunds of the surcharge proceeds. Accordingly, granting the requested relief will have no effect on existing surcharge procedures or the Commission's ability or authority to supervise surcharges.

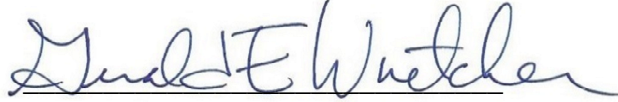
As none of the invited utilities has any interest in this matter or will be affected by a decision on the question presented by Estill District's Motion, the Commission's action to solicit briefs is not supported by or consistent with 807 KAR 5:001, Section 19 or with the Commission's recent decisions regarding intervention. Estill District objects to the invitation extended to these utilities and requests that the Commission withdraw its Order.

Summary

Estill County Water District No. 1 requests an Order declaring that, pursuant to KRS 278.190(3), the proposed water loss reduction surcharge is final and is no longer subject to refund pursuant to KRS 278.190(2). It objects to the Commission's "invitation" to non-parties who lack an interest in this matter to submit written briefs on its Motion for Declaratory Order and requests the Order of June 26, 2020 be withdrawn.

Dated: July 7, 2020

Respectfully submitted,

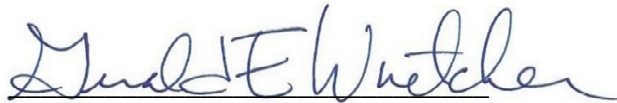


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CERTIFICATE OF SERVICE

In accordance with 807 KAR 5:001, Section 8, I certify that Estill County Water District No. 1's electronic filing of this Clarification and Objection is a true and accurate copy of the same document being filed in paper medium; that the electronic filing was transmitted to the Public Service Commission on July 7, 2020; that there are currently no parties that the Public Service Commission has excused from participation by electronic means in this proceeding; and that that within 30 days following the termination of the state of emergency declared in Executive Order 2020-215, this Notice of Intent in paper medium will be delivered to the Public Service Commission.



Gerald E. Wuetcher