

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In re: the matters of:

ELECTRONIC APPLICATION OF CUMBERLAND)	CASE NUMBERS
FALLS HIGHWAY WATER DISTRICT FOR A)	2022-00365 &
DEVIATION)	2022-00437

MEMORANDUM BRIEF IN SUPPORT OF CUMBERLAND
FALLS HIGHWAY DISTRICT'S POST-HEARING POSITION

Comes now the Cumberland Falls Highway Water District, by and through counsel, and for its Post-Hearing Memorandum Brief, states and provides as follows:

FACTS

Cumberland Falls Highway Water District (hereinafter “the District”) is a small utility that services approximately 3,674 customers with water. The District is located at 6926 Cumberland Falls Highway, Corbin, Whitley County, Kentucky 40701 and services a primarily rural population. During recent years, the District has undergone changes to its board and management. That information is relevant only to the extent necessary to help explain how certain oversights occurred regarding the District’s tariff.

The District’s tariff, which is on file with the Public Service Commission (hereinafter “PSC”), provides for reimbursement to developers for up to 50 feet of waterline extension. The applicable documents are titled “Contract for Extension of Water Main” and “Cumberland Falls Highway Water District Requirements for Line Extension Contract.” Both documents are attached hereto and collectively labeled as Exhibit A. Both documents must be signed by both the District and the developer, with certain obligations imposed upon both parties.

In the cases *sub judice*, there are two developers, Michael Sparks (hereinafter referred to as “Michael”) on behalf of The Meadows, and Jeffrey Sparks (hereinafter referred to as “Jeffrey”) on behalf

of Diamond Acres, LLC. Michael is the father of Jeffrey. It is coincidental that the two developer applicants are related. The development projects are separate and apart from one another. (VR¹ at 9:21:21 AM). Michael's project pertains to a residential subdivision. (VR at 11:02:46 AM). Jeffrey describes his project as a luxury recreational vehicle (RV) resort. (VR at 11:43:03 AM). Nevertheless, both Jeffrey and Michael, in their capacity as real estate developers, are seeking reimbursement from the District for the installation of water line extensions pursuant to the District's tariff.

The sixth paragraph of the Contract for Extension of Water Main states in pertinent part as follows:

As each new customer is connected directly to the line, the District will refund to those who paid for it in the beginning the amount equal to 50 feet times the actual cost per foot. This money goes to the signer of this contract.

Both tariffs set forth certain requirements in order for the developer to be reimbursed. Those pertinent requirements are as follows:

Contract for Extension of Water Main

- (1) Actual work must be done under the supervision of the District. See introduction.
- (2) The developer must fill out an application. See ¶1.
- (3) The District estimates the cost, with inclusion into the contract of a drawing of the new area and a detailed list of necessary materials. The District determines the size, location, materials and features of the water line, and the District sets forth certain requirements pertaining to cover, valves, *etc.* Further, if the line is on private property, the District must be granted an easement. See ¶2.
- (4) The contract must be signed before installation of the new water line. See ¶3.
- (5) Upon completion of the project, original bills and proof of payment must be submitted See ¶4.

Requirements for Line Extension Contract

- (1) The contract must be executed before work begins. See ¶a.

¹Video Recording. All references to "VR" are made to the hearing transcript from the hearing conducted on 4-20-23, made a part of the record herein.

- (2) All regulations promulgated by the District and the Division of Water Regulations must be followed. See ¶b.
- (3) District must be provided with the original Bill of Materials or Invoices within ten days of completion of work so that a true and actual cost of the extension can be made. See ¶c.
- (4) “All items above shall be completed, or the contract, as signed in item a, is void and no refunds shall be made.”

Unfortunately, neither Jeffrey nor Michael signed the contract before the work commenced. Further, Michael did not provide the invoices and proof of payment within the ten day deadline. Therein lies the issue.

Ken Taylor, the engineer for both the District and the developers, testified that he provided the Contract for Extension of Water Main and the Requirements for Line Extension Contract to both Michael and Jeffrey prior to the commencement of work *via* electronic mail. (VR at 10:16:05 AM and 10:18:03 AM). Copies of those emails to Michael and Jeffrey were submitted with the District’s responses to post-hearing requests for information.² Both Michael and Jeffrey testified that they did not receive the appropriate documentation prior to the commencement of work, and that they signed the paperwork as soon as they were notified that they needed to do so. (VR 11:30:42 and 12:24:10). It should also be noted that while Michael did submit his invoices and payments in a timely fashion, a complete set was not provided within the ten day time frame established in the tariff.

REQUEST FOR PERMISSION TO DEVIATE

Nevertheless, the District wants to reimburse both Jeffrey and Michael, as contemplated by all participants. The District believes that although the tariffs were not followed precisely, there has been substantial compliance. The District felt that because Michael and Jeffrey were working so closely with the District, and all parties were under the impression that a reimbursement would be made upon completion of the work, some technicalities should not prevent the reimbursements from being made. No

²These are the same documents provided in response to PSC’s post-hearing requests for information, labeled as Exhibit A, in both herein cases.

adverse effects were brought about by the failure of the developers to sign the paperwork before the commencement of work, nor were any adverse effects brought about by Michael's failure to get the paperwork submitted within ten days.

The District wishes to foster a good relationship with developers in the hopes of helping the local economy and increasing development. The District also has a pecuniary interest of its own. Theoretically, by attracting developers to the region, the District will increase its own number of customers and thereby generate revenue.

By majority vote, the District's Board, having considered and debated the issue at great length, voted to apply for a deviation from PSC to allow them to be able to reimburse both Michael and Jeffrey. Reimbursement has always been the plan, and the understanding of all involved participants. The District did not think it was fair that it would potentially lose out on new business, and the developers would not be reimbursed as had been contemplated by both the District and the developers, over minor technicalities.

THE DISTRICT'S POSITION

The District wants to do things right. It wants to comply with its tariff and comply with PSC. It also wants to do right by its customers. Accordingly, the District is seeking permission from PSC to deviate from its tariff so as to be able to reimburse Michael and Jeffrey. This is not something the District undertakes lightly, nor is an oversight of this nature something the District thinks is likely to happen in the future. The District is under relatively new management, with Michael Baird having assumed the position in June of 2020. The board members are fairly new. The longest-standing member was appointed in 2018. The others were appointed in 2020 and 2021. Given what has transpired in these two situations, the District does not anticipate that another similar situation will arise. Further, the District would also like to note that this is not its normal protocol. The District cannot recall ever having been in the position in the past in having to reach out to PSC for permission to deviate from its tariff.

OWNERSHIP OF LINE EXTENSION

Following the hearing held on April 20, 2023, Chairman Kent Chandler indicated some concerns with regards to the ownership of the water lines at issue in the respective developments. The fifth paragraph of the Contract for Extension of Water Main states in pertinent part as follows:

The customer is completely responsible for the installation and maintenance of the water service line from the water meter to the desired point of service. [...] When a new water line is placed in service it becomes a part of the District's system from its [sic] point of connection to an existing District water line to the customer's meter. The District will then accept responsibility for maintenance and upkeep of the line extension.

In the event PSC does not approve the District's request for deviation, and nullifies the existing contracts with Michael and Jeffrey, it would appear from Kentucky case law that the developers would continue to own the water lines and equipment that they installed. While there are no recent cases that address this issue, old law on the issue appears to remain good law. In *Kreamer v. Harmon*, 336 S.W.2d 561 (Ky. 1960), in a proceeding involving ownership of a system of water mains in a subdivision which was to be annexed by the city, and wherein developers of the subdivision and owners of the various lots contended that they were entitled to proceeds of the sale of the water system to city, the Court held that where lots were described by number and reference to recorded plat, even though deeds made no mention of the water system, the existence of the mains at the time of the sales made their use an appurtenant right passing with each lot but the water mains existing as integral part of utility system did not pass with property and subdivision developers who laid water system in dedicated streets did not part with ownership of mains and were entitled to sell them to city upon annexation. A similar holding was rendered in a suit to quiet title in and to water lines in a subdivision. The reviewing court held that absent a contractual basis for a claim of ownership by owners and developers of subdivision, such owners could not claim ownership of water lines installed in dedicated public streets by water company pursuant to contract with such owners.

The district has a pecuniary interest in ownership of the lines on these two developments. The district has recently expended large sums of money on other line extension projects in its district, so it can provide new customers with water services.

If the contract executed by the developers and the District is not upheld, case law appears to indicate that ownership of any lines or infrastructure installed by the developers remain theirs.

CONCLUSION

The District wants to foster a good relationship with area developers. The District is desirous of increasing its number of customers and thus increasing its revenues. During the preliminary stages of the Sparks' projects, both the developer applicants and the District were operating under the assumption that the tariff would be upheld, and the developers would be reimbursed per the tariff. It was not until the projects were well underway that it was discovered that the contracts had not, in fact, been signed. The District took action immediately, as did the developers, to sign the appropriate paperwork. The District would like to reimburse both Michael and Jeffrey, as everyone had originally contemplated. However, in order to do so, the District must seek permission from PSC, which it is doing.

WHEREFORE, the District respectfully asks that it be permitted to reimburse both Michael Sparks and Jeffrey Sparks, as is provided for in the Contract for Extension of Water Main, and that the Contract for Extension of Water Main be upheld as a valid and binding contract.

RESPECTFULLY SUBMITTED,

/s/ Amanda Hill

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