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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002284-MR

NORTHERN KENTUCKY WATER DISTRICT

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 06-CI-01121

PUBLIC SERVICE COMMISSION;
CRESTBROOK PROPERTIES, LLC; AND
GREATER CINCINNATI NORTHERN
KENTUCKY APARTMENT ASSOCIATION

APPELLEES

OPINION AFFIRMING

** ** * ** * ** *

BEFORE: STUMBO, THOMPSON, AND WINE, JUDGES.

STUMBO, JUDGE: The Northern Kentucky Water District (hereinafter NKWD)

appeals the Franklin Circuit Court's ruling that the Public Service Commission

(hereinafter PSC) had jurisdiction over the regulation of cross-connections.¹ The

¹ Cross-connections are prohibited in Kentucky. 401 KAR 8:020 §2(2). Cross-connections are physical connections or arrangements "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." 401 KAR

Water District argues that the Division of Water (hereinafter DOW), a part of the Energy and Environment Cabinet, has jurisdiction over cross-connections. The Appellees argue that the PSC has jurisdiction because the PSC has exclusive jurisdiction over issues concerning the rates and services of public utilities. For the following reasons we affirm the circuit court.

On July 1, 1997, NKWD filed a proposed revision to its existing policy regarding cross-connections with the PSC. This policy was again modified in June of 2000. The proposed policy established standards for eliminating cross-connections and required all new and existing commercial, industrial, multi-family, and government customers to meet these standards. The policy stated that NKWD would begin compliance inspections of these customers based on meter size and water usage. The customers with the largest meter and largest usage would be inspected first. Any existing customers who failed to meet the standards would be given a reasonable amount of time to comply before NKWD discontinued water service.

Crestbrook Properties, LLC owns multi-family residences in NKWD's utility service area. In October of 2000, NKWD sought the installation of backflow prevention devices, which are one method for eliminating cross-connections, at properties owned by Crestbrook. When Crestbrook refused to install the devices, NKWD brought an action in Kenton Circuit Court to compel the installation. Crestbrook brought a counterclaim against NKWD in which it

8:010(14).

asserted the cross-connection policy violated the equal protection clause, the Kentucky Constitution, and KRS 278.170 which states in pertinent part

[n]o 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.

While this action was pending, Crestbrook filed a formal complaint with the PSC. Shortly after filing the complaint with the PSC, the Kenton Circuit Court granted summary judgment for NKWD and ordered Crestbrook to comply with the cross-connection policy. Crestbrook appealed, which led to the PSC holding its proceedings in abeyance until the resolution of the appeal suspending all discovery. A previous panel of this Court held that the Kenton Circuit Court erred in granting summary judgment. The Court stated that Crestbrook should not be forced to comply with the policy until the PSC determined whether it was reasonable and not discriminatory.

After the ruling from the Court of Appeals, the PSC held a hearing on August 6, 2002. Crestbrook argued that the cross-connection policy constituted selective enforcement of the regulatory prohibition on cross-connections in that NKWD inspected commercial, industrial, multi-family, and government structures for cross-connections, but not single-family residences. Crestbrook argued that no reasonable distinction existed between multi-family and single-family structures

and NKWD's enforcement of the cross-connection policy against multi-family structures and not single-family structures was discriminatory.

Crestbrook also argued that the degree of hazard and the type of cross-connection present should be considered in determining if a backflow device should be installed. Crestbrook noted that these were not mentioned in the policy and that NKWD did not explain why larger water meters alone increased the probability of water contamination due to cross-connections.

NKWD argued that its practices were reasonable and that the larger the meter the more likely cross-connection contamination could occur. Commercial, industrial, multi-family, and government structures generally had larger meters than single-family residences.

On July 17, 2003, the PSC entered an order on Crestbrook's complaint. The PSC concluded that multi-family residences do not pose a greater threat than single-family residences. It found that the classification was arbitrary and put a significant burden on the owners of multi-family residences that the owners of single-family residences did not have to bear. The PSC stated both multi-family and single-family residences engage in low hazard activities and that NKWD should amend its policy to treat all residential structures equally.

On July 9, 2004, NKWD filed revised cross-connection rules with the PSC. On August 5, 2004, the PSC suspended the proposed revisions so it could investigate the reasonableness of the revisions. The PSC allowed Crestbrook and the Greater Cincinnati Northern Kentucky Apartment Association, which also

owned multi-family residences in NKWD's service area, to intervene in the case and also incorporated the record of the 2001 case into the record of this new proceeding.

NKWD's new policy required single-family residences to adhere to the cross-connection rules. It also stated that it was going to use meter size as a factor in deciding which structures to inspect first, meaning that those structures with larger meters would be inspected first for cross-connections.

The PSC was concerned that NKWD continued to use meter size as a basis upon which to implement the cross-connection policy. NKWD responded by stating it needed some logical means to identify and select customers for enforcement. NKWD continued to argue that there was a correlation between meter size and degree of hazard of contamination.

On July 12, 2006, the PSC rejected the revised policy. It found that using meter size to determine which structures to inspect first would still discriminate against multi-family structures since they would have larger meters. In essence, the new policy would have the same discriminatory effect as the first policy. The PSC ordered NKWD to submit a revised cross-connection policy.

NKWD then brought action for review of the July 12, 2006, Order in Franklin Circuit Court. On November 12, 2008, the Franklin Circuit Court found in favor of the PSC and dismissed NKWD's complaint. This appeal followed.

The essence of this appeal is NKWD's argument that the DOW is the agency that should determine whether the cross-connection policy is reasonable and that the PSC does not have jurisdiction to decide the issue.

The DOW is an agency of the Environmental and Public Protection Cabinet. The Environmental and Public Protection Cabinet's jurisdiction is set forth in KRS Chapter 224. Title 401 of the Kentucky Administrative Regulations sets forth the applicable regulations dealing specifically with water. The PSC is a statutorily formed administrative agency with jurisdiction over rates and services of utilities, including water. KRS 278.040; see generally KRS Chapter 278. Title 807 of the Kentucky Administrative Regulations sets forth the regulations for the PSC. Specifically, 807 KAR 5:066 deals with water.

“The [Commission] acts as a quasi-judicial agency utilizing its authority to conduct hearings, render findings of fact and conclusions of law, and utilizing its expertise in the area and to the merits of rates and service issues.” *Simpson County Water Dist. v. City of Franklin*, 872 S.W.2d 460, 465 (Ky. 1994). “The jurisdiction of the commission shall extend to all utilities in this state.” KRS 278.040(2). Further, “[t]he commission shall have exclusive jurisdiction over the regulation of rates and service of utilities[.]” Consequently, the standard of review for an order entered by the Commission is necessarily circumscribed. “In all trials, actions or proceedings arising under the preceding provisions of this chapter or growing out of the commission's exercise of the authority or powers granted to it, the party seeking to set aside any determination, requirement, direction or order of the commission shall have the burden of proof to show by clear and satisfactory evidence that the determination, requirement, direction or order is unreasonable or unlawful.” KRS 278.430. The orders of the Commission “can be found unreasonable only if it is

determined that the evidence presented leaves no room for difference of opinion among reasonable minds.” *Kentucky Indus. Utility Customers, Inc. v. Kentucky Utilities Co.*, 983 S.W.2d 493, 499 (Ky. 1998) (citing *Energy Regulatory Com’n v. Kentucky Power*, 605 S.W.2d 46 (Ky. App. 1980)).

Although the Commission is granted sweeping authority to regulate public utilities pursuant to the provisions of KRS Chapter 278, it is nonetheless a creature of statute. Therefore, it “has only such powers as granted by the General Assembly.” *PSC v. Jackson County Rural Elec. Co-op., Inc.*, 50 S.W.3d 764, 767 (Ky. App. 2000). Whether the Commission exceeded the scope of its authority is a question of law that we scrutinize closely and review *de novo*. *Com., Transportation Cabinet v. Weinberg*, 150 S.W.3d 75 (Ky. App. 2004). *Cincinnati Bell Telephone Co. v. Kentucky Public Service Com’n*, 223 S.W.3d 829, 836 (Ky. App. 2007). Finally, as always, we review questions of law *de novo*. *City of Greenup v. Public Service Com’n*, 182 S.W.3d 535, 539 (Ky. App. 2005).

Commonwealth, ex rel. Stumbo v. Kentucky Public Service Com’n, 243 S.W.3d 374, 378 (Ky. App. 2007).

NKWD argues that the DOW should have jurisdiction of the cross-connection issue, because the PSC has not enacted any regulations that specifically discuss cross-connections, while the DOW does have such provisions. We disagree.

The only DOW regulation pertinent to cross-connections is 401 KAR 8:020 §2(2), which generally prohibits cross-connections. Neither the DOW nor PSC have enacted regulations specifically on the establishment or implementation of cross-connections. However, the PSC does have extensive regulations

concerning its jurisdiction over utilities and their services. It is undisputed that NKWD is a utility.

Notwithstanding any of the provisions of KRS Chapter 74, any water district; combined water, gas, or sewer district; or water commission, except a joint commission created under the provisions of KRS 74.420 to 74.520, shall be a public utility and shall be subject to the jurisdiction of the Public Service Commission in the same manner and to the same extent as any other utility as defined in KRS 278.010 [Emphasis added]

KRS 278.015.

The trial court based its decision on a determination that cross-connections were an aspect of service of the utility. “Service” is defined by KRS 278.010(13) as:

any practice or requirement in any way relating to the service of any utility, including the voltage of electricity, the heat units and pressure of gas, the purity, pressure, and quantity of water, and in general the quality, quantity, and pressure of any commodity or product used or to be used for or in connection with the business of any utility, but does not include Voice over Internet Protocol (VoIP) service.

Additionally, 807 KAR 5:066 §3(1), a regulation promulgated by the PSC, states that all utilities furnishing water must comply with all requirements of the Natural Resources Cabinet, which includes the DOW and its prohibition of all cross-connections.

KRS 278.040 states:

(1) The Public Service Commission shall regulate utilities and enforce the provisions of this chapter . . .

(2) The jurisdiction of the commission shall extend to all utilities in this state. The commission shall have exclusive jurisdiction over the regulation of rates and service of utilities, but with that exception nothing in this chapter is intended to limit or restrict the police jurisdiction, contract rights or powers of cities or political subdivisions.

(3) The commission may adopt, in keeping with KRS Chapter 13A, reasonable regulations to implement the provisions of KRS Chapter 278 and investigate the methods and practices of utilities to require them to conform to the laws of this state, and to all reasonable rules, regulations and orders of the commission not contrary to law.

Further, KRS 278.170 states:

(1) 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 . . .

(4) The commission may determine any question of fact arising under this section.

Additionally, KRS 278.260(1) states:

The commission shall have original jurisdiction over complaints as to rates or service of any utility, and upon a complaint in writing made against any utility by any person that any rate in which the complainant is directly interested is unreasonable or unjustly discriminatory, or that any regulation, measurement, practice or act affecting or relating to the service of the utility or any service in connection therewith is unreasonable, unsafe, insufficient or unjustly discriminatory, or that any service is inadequate or cannot be obtained, the commission shall

proceed, with or without notice, to make such investigation as it deems necessary or convenient. The commission may also make such an investigation on its own motion. No order affecting the rates or service complained of shall be entered by the commission without a formal public hearing.

Finally, KRS 278.280(1) states:

Whenever the commission, upon its own motion or upon complaint as provided in KRS 278.260, and after a hearing had upon reasonable notice, finds that the rules, regulations, practices, equipment, appliances, facilities or service of any utility subject to its jurisdiction, or the method of manufacture, distribution, transmission, storage or supply employed by such utility, are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the commission shall determine the just, reasonable, safe, proper, adequate or sufficient rules, regulations, practices, equipment, appliances, facilities, service or methods to be observed, furnished, constructed, enforced or employed, and shall fix the same by its order, rule or regulation.

Cross-connections are prohibited because they can potentially pollute the public water system. Also, new and current NKWD customers must comply with the cross-connection policy in order to receive water. As the trial court held, the cross-connection policy fits into the definition of service because it is a practice and requirement that deals with the purity, pressure, and quality of water. As can be seen from the cited statutes above, the PSC has sweeping jurisdiction when it comes to utilities and their services, especially when a policy or regulation relating to a service is unreasonable or discriminatory, which was precisely the issue in the case *sub judice*. The DOW can prohibit cross-connections, but as they ultimately fall under the definition of “service,” the PSC determines if the cross-connection

regulations are appropriate. NKWD cannot demonstrate by clear evidence that this is not an issue for the PSC to determine.

NKWD also argues that the circuit court's opinion violates KRS 13A.100 because the PSC has not enacted any specific regulations concerning cross-connections. We disagree. KRS 13A.100 states:

Subject to limitations in applicable statutes, any administrative body which is empowered to promulgate administrative regulations shall, by administrative regulation prescribe, consistent with applicable statutes: (1) Each statement of general applicability, policy, procedure, memorandum, or other form of action that implements; interprets; prescribes law or policy; describes the organization, procedure, or practice requirements of any administrative body; or affects private rights or procedures available to the public

PSC's administrative regulation 807 KAR 5:066 §3(1) requires all utilities to adhere to any requirements set forth by the DOW. The DOW prohibits cross-connections and the PSC ensures that utilities conform to this prohibition in a reasonable and nondiscriminatory manner.

Additionally, the primary issue here is not whether Crestbrook had cross-connections that needed to be eliminated, but whether NKWD's cross-connection policy was unreasonable and discriminatory. This falls directly within the purview KRS 278.170, KRS 278.260, and KRS 278.280.

NKWD also argues that it cannot conform to both the PSC's order to change its cross-connection policy and the DOW's regulation prohibiting cross-connections. In short, NKWD alleges that if it can't use meter size in its policy,

then it can't follow DOW's regulation prohibiting cross-connections. This argument is without merit. NKWD must develop some other method for implementing its cross-connection policy without relying on meter size. The PSC has twice ordered NKWD to remove meter size from its policy because it was being used in a discriminatory manner.

In its final argument, NKWD claims it was not afforded due process when the PSC rejected the revised cross-connection policy on July 12, 2006, without a hearing. Again we must disagree. The issue of meter size in the regulation was determined in 2003, when the PSC rejected NKWD's first cross-connection policy.

When the revised policy came up for review, the PSC allowed the record from the previous policy determination to be entered into the current record and considered for the revised policy determination. Once the PSC determined NKWD had again utilized meter size in its revised policy, it entered a show cause order directing NKWD to show in writing why the revised policy should not also be rejected, thus giving NKWD an opportunity to be heard.

We find that NKWD was afforded ample due process because the same issue was at the center of both policy reviews: whether the use of meter size in determining the order in which service connections are reviewed was discriminatory. The PSC incorporated the record from the first policy determination, complete with discovery, briefs, a hearing, and expert witnesses.

Also, the PSC allowed NKWD the opportunity to show cause as to why the revised policy should not be rejected.

We therefore hold that NKWD did not provide clear and satisfactory evidence that the orders of the PSC were unreasonable or unlawful. We affirm the order of the Franklin Circuit Court.

ALL CONCUR.

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