

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

INVESTIGATION INTO THE PROPOSED WATER)
SUPPLY AGREEMENT BETWEEN FRANKFORT) CASE NO. 2013-00250
ELECTRIC AND WATER PLANT BOARD AND)
SOUTH ANDERSON WATER DISTRICT)

INTERIM ORDER

On October 25, 2012, Frankfort Electric and Water Plant Board ("Frankfort Plant Board") filed through the Commission's Tariff Filing System a copy of a contract between Frankfort Plant Board and South Anderson Water District ("South Anderson") dated October 23, 2012 ("Contract"). Under the terms of the Contract, Frankfort Plant Board will supply water to South Anderson for 42 years, with South Anderson purchasing a minimum of 5,000,000 gallons per month computed on an annual basis. Pursuant to the Contract, South Anderson agrees to advance Frankfort Plant Board \$242,264 to aid in construction of improvements to Frankfort Plant Board's system. The Contract is silent regarding what specific improvements will be made to Frankfort Plant Board's system.

The Commission initiated a proceeding on July 3, 2013, to investigate the reasonableness and lawfulness of the Contract and to determine whether the Contract was an evidence of indebtedness under KRS 278.300 which would require South Anderson to obtain Commission approval prior to execution of the Contract. Pursuant to the Commission's July 3, 2013 Order, on August 2, 2013, Frankfort Plant Board filed

a memorandum regarding the applicability of KRS 278.300 to the Contract. On August 9, 2013, South Anderson filed a memorandum indicating that it adopted Frankfort Plant Board's August 2, 2013 memorandum as South Anderson's memorandum.

Frankfort Plant Board argues that the Contract is an ordinary commercial contract containing bilateral agreements and is not an evidence of indebtedness.¹ Frankfort Plant Board further argues that the plain language of KRS 278.300 indicates that the statute is not applicable to wholesale water purchase agreements with a minimum purchase clause.²

The Commission thoroughly reviewed the various sections of KRS 278.300 to determine whether a contract with a minimum purchase clause is an evidence of indebtedness.

KRS 278.300(1) states:

No utility shall *issue* any securities or evidences of indebtedness, or assume any obligation or liability in respect to the securities or evidences of indebtedness of any other person until it has been authorized so to do by order of the commission." (Emphasis added.)

Other sections of KRS 278.300 use the term *issue*. KRS 278.300(2) says, "Application for authority to *issue*" KRS 278.300(3) says, "The commission shall not approve any *issue*" KRS 278.300(6) says, "Securities and evidences of indebtedness *issued*" KRS 278.300(7) says, "The commission may require periodical or special reports from the utility *issuing*" KRS 278.300(8) says, "This section does not apply to notes *issued*" KRS 278.300(9) says, "Nothing in this

¹ Board's August 2, 2013 Brief at 10-13.

² *Id.* at 5-10.

section limits the power of any court having jurisdiction to authorize or cause receiver's certification or debenture to be *issued*” KRS 278.300(10) says, “This section does not apply in any instance where the *issuance*” KRS 278.300(11) says, “This section also does not apply to the *issuance*”

KRS Chapter 278 does not define the term “*issue*”. Entering into a contract to purchase water or any other product is not generally considered an issuance by either the seller or purchaser. Black’s Law Dictionary contains several definitions for the term *issue*, including “[a] class or series of securities that are simultaneously offered for sale” and “[t]o send out or distribute officially.” Under commercial law, *issue* is defined as “[t]he first delivery of a negotiable instrument by its maker or holder.” Black’s Law Dictionary 907-908 (9th Ed. 2009). None of the definitions indicate that an *issuance* occurs when parties enter into a contract for the purchase of a product not involving a document of title. The Contract at hand involves the supply and purchase of water, not the issuance of securities or delivery of a negotiable instrument.

As listed in KRS 278.300, an evidence of indebtedness means something different from a security. If evidence of indebtedness and security were synonymous, only one of the terms would be necessary. Because both terms are used, the terms cannot be synonymous; however, the term *issue* refers to both evidence of indebtedness and security. The term *issue* cannot mean one thing for the term *security* and something else for the term *evidence of indebtedness*.

Both the term *security* and *evidence of indebtedness* involve some form of financing arrangement. That both terms involve some form of financing arrangement is evident in KRS 278.300(3), which states:

The commission shall not approve any issue or assumption unless, after investigation of the purposes and uses of the proposed issue and the *proceeds* thereof, or of the proposed assumption of obligation or liability, the commission finds that the issue or assumption is for some lawful object within the corporate purposes of the utility, is necessary or appropriate for or consistent with the proper performance by the utility of its service to the public and will not impair its ability to perform that service, and is reasonably necessary and appropriate for such purpose. (Emphasis added.)

Generally, a contract to purchase a product would not result in *proceeds*. Black's Law Dictionary defines *proceeds* as:

1. The value of land, goods, or investments when converted into money; the amount of money received from a sale <the proceeds are subject to attachment>. 2. Something received upon selling, exchanging, collecting, or otherwise disposing of collateral. UCC § 9–102(a)(67). • Proceeds differ from other types of collateral because they constitute any collateral that has changed in form. For example, if a farmer borrows money and gives the creditor a security interest in the harvest, the harvested wheat is collateral. If the farmer then exchanges the harvest for a tractor, the tractor becomes the proceeds of the wheat.³

While the term “proceeds” does not necessarily mean only cash or money, the term “*proceeds*” does not apply to a contract containing a minimum purchase clause for the purchase of water. Frankfort Plant Board and South Anderson are not selling property or converting money into other property.

KRS 278.300(7) also implies that a contract with a minimum purchase clause is not an evidence of indebtedness.

The commission may require periodical or special reports from the utility issuing any security or evidence of indebtedness. The report shall show, in such detail as the commission requires, the disposition made of such securities

³ Black's Law Dictionary 1325 (9th Ed. 2009).

or evidences of indebtedness, and the application of the proceeds thereof.

The term "*proceeds*" is again used. As already stated, the term "*proceeds*" does not apply to a contract containing a minimum purchase clause for the purchase of water.

Having considered Frankfort Plant Board's brief, the Contract, and having carefully reviewed the language set forth in KRS 278.300, the Commission finds that:

1. All contracts and amendments to contracts for the sale for resale of water by a city-owned utility to a Commission-regulated water utility are subject to the Commission's jurisdiction pursuant to KRS 278.200 and are required to be filed with the Commission.

2. Any minimum purchase requirements or minimum service charges for the sale for resale of water in a contract by a city-owned utility to a Commission-regulated utility may be investigated for reasonableness at the time of filing or upon complaint.

3. All rates, terms, and conditions for the sale of water by a Commission-regulated utility to another Commission-regulated utility are subject to the Commission's jurisdiction pursuant to KRS 278.030 and 278.040.

4. Any minimum purchase requirements or minimum service charges for the sale of water by a Commission-regulated utility to another Commission-regulated utility may be investigated for reasonableness at the time of filing or upon complaint.

5. Contracts, amendments to contracts, or tariffs containing minimum purchase requirements or minimum service charges for the sale or purchase of water should not be considered evidences of indebtedness.

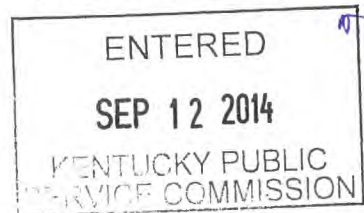
6. The parties should provide the Commission with an itemization of the proposed use of the \$242,264 being advanced by South Anderson to Frankfort Plant Board.

IT IS THEREFORE ORDERED that:

1. Contracts and amendments to contracts for the sale for resale of water by a city-owned utility to a Commission-regulated water utility shall be filed by the seller with the Commission pursuant to KRS 278.200, but the Commission-regulated water utility need not obtain approval as an evidence of indebtedness under KRS 278.300 of any minimum purchase requirement in such a contract or amendment.

2. Within 20 days of the date of this Order, the parties shall provide the Commission with an itemization of the proposed use of the \$242,264 being advanced by South Anderson to Frankfort Plant Board.

By the Commission



ATTEST:



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