



Copy

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Governor

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Ronald B. McCloud, Secretary
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Helen Helton
Executive Director
Public Service Commission

October 1, 1999

Jason P. Thomas, Esq.
Stites and Harbison
400 West Market Street
Suite 1800
Louisville, Kentucky 40202-3352

Re: Kentucky Turnpike Water District

Dear Mr. Thomas:

Commission Staff is in receipt of your letter of August 23, 1999 regarding Kentucky Turnpike Water District ("Kentucky Turnpike").

In your letter, you present the following facts: Kentucky Turnpike, a water district organized pursuant to KRS Chapter 74, constructed in 1997 a water transmission main along the Cedar Grove Road in eastern Bullitt County, Kentucky. It did not seek or receive a certificate of public convenience and necessity prior to the construction of this transmission main. Kentucky Turnpike financed the construction with a short-term loan and is presently seeking permanent, long-term financing. The absence of a certificate of public convenience and necessity has raised concerns over "the legality of the Cedar Grove Road Line." These concerns may prevent the water district from securing traditional financing and may force the use of "non-traditional financing at considerably higher cost."

Your letter poses the following issue: Does Kentucky Turnpike's failure to obtain a certificate of public convenience and necessity prior to its construction of the Cedar Grove Road Water Transmission Main render its operation of that transmission main illegal?

All utilities are required to obtain a certificate of public convenience and necessity before constructing any utility facility. KRS 278.020(1) provides:

No person, partnership, public or private corporation, or combination thereof shall commence providing utility service to or for the public or begin the construction of any plant,



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equipment, property, or facility for furnishing to the public any of the services enumerated in KRS 278.010, except retail electric suppliers for service connections to electric-consuming facilities located within its certified territory and ordinary extensions of existing systems in the usual course of business, until that person has obtained from the Public Service Commission a certificate that public convenience and necessity require the service or construction.

The chief purpose of KRS 278.020(1) is "to prevent the unnecessary duplication of facilities for utility service and to protect the consuming public from inadequate service and higher rates which frequently result from such duplication." City of Vanceburg v. Plummer, 275 Ky. 713, 122 S.W.2d 772, 775 (1938). See also Duerson v. East Kentucky Power Cooperative, Inc., Ky.App., 843 S.W.2d 340, 342 (KRS 278.020(1) is "designed to protect the public against exorbitant utility rates emanating from unnecessary and duplicitous . . . facilities.").

As KRS 278.020(1) clearly requires Commission review and approval of a proposed facility **before** the construction of that facility commences, the Commission has historically refused to issue certificates of public convenience and necessity on constructed facilities. See Boone County Water and Sewer District, Case No. 92-532 (Ky. P.S.C. Dec. 9, 1993); Southern Madison Water District, Case No. 90-305 (Ky. P.S.C. Nov. 1, 1991) at 2 (the Commission "does not certificate construction projects which have already been constructed"). If Kentucky Turnpike intends to apply for a certificate of public convenience and necessity for the Cedar Grove Road Transmission Main at this late date, it should distinguish this precedent.

While a utility's failure to obtain a certificate of public convenience and necessity for its facilities constitutes a violation of KRS 278.020(1), it does not render the operation of those facilities illegal. Expenses associated with facilities for which a certificate of public convenience and necessity has not been granted, however, may not necessarily be recovered through the utility's rates. The Commission must determine whether the facilities in question are used and useful in providing utility service. If such facilities are used and useful, then the Commission may consider the expenses associated with those facilities in establishing the utility's rates.

In the case of the Cedar Grove Road Transmission Main, the Commission has determined that the transmission main is necessary to Kentucky Turnpike's provision of water service and has considered expenses associated with that transmission main in establishing Kentucky Turnpike's rates for water service. See Kentucky Turnpike Water District, Case No. 98-398 (Ky. P.S.C. June 30, 1999) at 10-11. Such a determination is

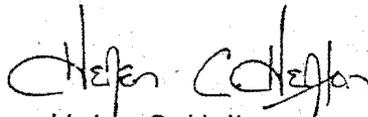
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binding upon the Commission in future rate proceedings unless a change in circumstances or previously undisclosed evidence is shown.

Please note that the Commission's decision in Case No. 98-398 does not relieve Kentucky Turnpike or its officers from any liabilities that may result from any violation of KRS 278.020. KRS 278.990(1) and KRS 74.455 prescribe certain actions that the Commission may take if a violation of KRS 278.020 is found to have occurred.

This letter represents Commission Staff's interpretation of the law as applied to the facts presented. This opinion is advisory in nature and not binding on the Commission should the issues herein be formally presented for Commission resolution. Questions concerning this opinion should be directed to Gerald Wuetcher, Commission counsel, at (502) 564-3940, Extension 259.

Sincerely,



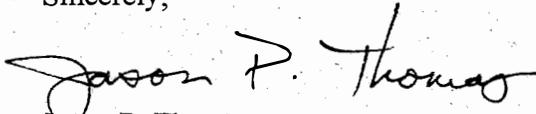
Helen C. Helton
Executive Director

STITES & HARBISON
ATTORNEYS

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Thank you in advance for your time and consideration regarding this very important issue. I look forward to hearing from you.

Sincerely,


Jason P. Thomas

JPT:jan

cc: F. Raymond Abell
Dan Thibodeaux
KE161:00KE2:68111:LOUISVILLE