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April 19, 2011

J.P. Cline III, Esq.
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Post Office Box 2220
Middlesboro, Kentucky 40965

PSC STAFF OPINION 2011-007

Re: Ambleside, Ltd.

Dear Mr. Cline:

Commission Staff acknowledges receipt of your letter of February 24, 2011 in which you request on behalf of Ambleside, Ltd. ("Ambleside") an opinion regarding its responsibility for fees that are assessed for fire hydrants that serve the Ambleside Subdivision in Bell County, Kentucky.

At the outset, Commission Staff notes that it has previously addressed a similar question involving the provision of fire protection service to the Ambleside Subdivision in PSC Staff Opinion 2010-016. A copy of this opinion is enclosed for your reference.

Based upon your letter of February 24, 2011 and its review of PSC Staff Opinion 2010-016, Commission Staff understands the facts as follows:

Water Service Corporation of Kentucky, Inc. ("WCKY"), a subsidiary of Utilities, Inc., owns and operates facilities that distribute water to and for the public in and around Middlesboro, Kentucky.

Ambleside Subdivision is a subdivision located in the unincorporated area of Bell County, Kentucky. WCKY provides water service to Ambleside Subdivision.

Ambleside, Ltd. ("Ambleside"), a Kentucky for-profit corporation organized in 1981,¹ began development of the Ambleside Subdivision in 1981. It procured the design and

¹ Notwithstanding statements in your letter of February 24, 2011 that Ambleside is a limited partnership, the records of the Office of the Kentucky Secretary of State indicate that Ambleside is a for-profit corporation and not a limited partnership. See <https://app.sos.ky.gov/ftshow/%28S%283ogwiw45cw24v3551hwmgt55%29%29/default.aspx?path=ftsearch&id=0153097&ct=09&cs=9999> (last visited April 9, 2011).

installation of the water distribution system that serves the subdivision. This system, which included fire hydrants, was subsequently donated to WCKY's predecessor in interest² and is located on county road rights-of-way that Ambleside originally dedicated as public roads.

Twenty-one hydrants are located in Ambleside Subdivision on county-owned and maintained roads. WCKY owns and maintains these hydrants. Three times a year it flushes and inspects the hydrants. It tests the flow and paints the hydrants every five years. WCKY is responsible for replacing damaged and inoperable hydrants.

Under the terms of its filed rate schedules, WCKY assesses a monthly fee of \$4.30 for service to public fire hydrants that the city of Middlesboro owns. It assesses monthly fee of \$19.35 for private hydrants and sprinkler systems. A copy of the pertinent tariff sheet is enclosed.

Ambleside has assumed responsibility for the charges associated with the fire hydrants in the Ambleside Subdivision since the subdivision's inception. In November 2008, contending that all fire hydrants were located on Bell County owned right-of-way and therefore did not constitute private hydrants, Ambleside ceased paying the charges. It takes the position that "if these fire hydrants are located on a public right-of-way, then they not qualify as 'private hydrants', and WCK[Y] must look to Bell County, Kentucky for payment of any applicable hydrant fee at the substantially reduced rate applicable for municipal hydrants."

No evidence exists of a contractual relationship between WCKY and Bell County Fiscal Court regarding the provision of fire protection service or the provision of fire

² Until 1985 Kentucky Water Service Company, Inc. owned and operated the water distribution system that currently serves Middlesboro, Kentucky. Aqua Corporation subsequently acquired control of ownership of the assets of Kentucky Water Service Company. See Case No. 9392, *Application of the Aqua Corporation for Authority to Acquire One Hundred Percent (100%) of the Common Stock of Kentucky Water Service Company, Inc.* (Ky. PSC Sept. 19, 1985); Case No. 9431, *Joint Filing Seeking Authority for Kentucky Water Service Company, Inc. to Transfer Its Water Plants Located at Middlesboro and Clinton to the Aqua Corporation* (Ky. PSC Nov. 15, 1985). In 1998, Utilities of Kentucky, Inc. acquired Aqua Corporation's stock. Case No. 98-291, *The Application of Aqua/KWS, Inc. For Approval of Transfer of Stock to Utilities of Kentucky, Inc.* (Ky. PSC July 27, 1998). In 2002 WCKY acquired the assets of Aqua Corporation. Case No. 2002-00142, *Joint Application of Aqua/KWS, Inc., Utilities of Kentucky, Inc., and Water Service Corporation of Kentucky for Approval of the Transfer of the Ownership of the Assets of Aqua/KWS, Inc. and Utilities of Kentucky, Inc. to Water Service Corporation of Kentucky Pursuant to the Provisions of KRS 278.020(4) and (5) and 807 KAR 5:001(8)* (Ky. PSC June 14, 2002).

hydrants nor is there any evidence of such relationship between Ambleside and Bell County Fiscal Court.

Your letter presents the following question: May WSCKY lawfully assess and bill Ambleside for fire hydrants that are located on public road right-of-way that county government owns?

Water utilities generally have no obligation to provide fire protection service unless it expressly assumes that obligation by contract or is expressly directed by statute or an appropriate regulatory authority.³ No Kentucky statute expressly requires WSCKY to provide fire hydrants or to make fire protection service available to its customers. The Public Service Commission has permitted a large number of water utilities to disclaim in their filed rate schedules any obligation to provide fire protection service.⁴ A survey of water utilities indicates that only 38 percent of all water utilities subject to Public Service Commission jurisdiction had established rules for fire hydrant service and suggests that most water utilities in the Commonwealth that are subject to Public Service Commission jurisdiction do not provide such service.⁵

The Public Service Commission's regulations are relatively silent on the provision of fire protection service. The only reference to such service is found at 807 KAR 5:066, Section 10(2)(b). This rule establishes the minimum standards under which a water utility is authorized to install fire hydrants on its distribution system. It further provides:

The location, installation, and the responsibility for maintenance of fire hydrants, public and private fire protection facilities, connecting mains, and their ownership may be subject to negotiation between the utility and the applicant. Fire hydrants and public and private fire protection facilities shall be installed as required by the utility and if owned by the utility shall be subject to any conditions the commission may impose, based upon the compensation received for this service.

In the absence of any specific statutory or regulatory provisions on fire protection service, any review of WSCKY's provision of fire protection service must refer to WSCKY's filed rate schedules. KRS 278.030(2) provides that "[e]very utility shall

³ 94 C.J.S *Waters* § 744 (2011).

⁴ See Administrative Case No. 385, *An Investigation Into Fees For Fire Protection Services* (Ky. PSC Dec. 7, 2001) at 8 (noting that 44 percent of all water utilities responding to a Commission survey do not provide any fire protection services). In 2001 a Commission Staff review of the filed rate schedules found that 45 percent of all water utilities expressly disclaimed any responsibility for fire protection services. See Carryn Lee and Gerald Wuetcher, Final Staff Report on Water Utility Responses to Commission's Interrogatories (filed Dec. 7, 2001) ("Final Report"), Administrative Case No. 385, *An Investigation Into Fees For Fire Protection Services* (Ky. PSC), available at ftp://ftp.psc.state.ky.us/order_vault/Orders_2001/20000385_12072001apx_staffreport.pdf.

⁵ Final Report at 6.

furnish adequate, efficient and reasonable service, and may establish reasonable rules governing the conduct of its business and the conditions under which it shall be required to render service." KRS 278.160(2) provides that "[n]o utility shall charge, demand, collect, or receive from any person a greater or less compensation for any service rendered or to be rendered than that prescribed in its filed schedules, and no person shall receive any service from any utility for a compensation greater or less than that prescribed in such schedules." The Public Service Commission has held that a utility may not provide a service unless such service is set forth in its filed rate schedule and may only provide that service under the terms set forth in the filed rate schedule.⁶

WSCKY's filed rate schedules only briefly address fire protection service. They provide for three types of service: (1) private hydrants⁷ or sprinkler systems; (2) Clinton municipally owned hydrants; and (3) Middlesboro municipally owned hydrants.⁸ They further restate the Public Service Commission's rule regarding fire hydrants.⁹ They do not provide a separate rate classification for local or county governments other than the cities of Middlesboro and Clinton. The filed rate schedules make no provision for imposing any fees for fire hydrant on any person other than the applicant for the service.

Based upon its review of the WSCKY's filed rate schedules, Commission Staff is unable to find any basis to support Ambleside's contention that Bell County Fiscal Court is the responsible party for private fire hydrant service that WSCKY current provides to the Ambleside Subdivision. The existing evidence shows that Ambleside requested the service and its development enjoys the benefits of that service. There is no evidence to suggest that Bell County Fiscal Court has requested or applied for such service. No provision in WSCKY's tariff would permit the imputation of the fees for such service to Bell County Fiscal Court. Assuming *arguendo* that a basis to impose financial responsibility upon Bell County Fiscal Court existed, the water utility's rate schedule would require the Bell County Fiscal Court to pay a monthly private fire hydrant rate of \$19.35 per hydrant, not the lower rate as suggested in your letter.

Commission Staff is of the opinion that the location of the private fire hydrants on public road right-of-ways is irrelevant to determining responsibility for the cost of private

⁶ See, e.g., Case No. 90-108, *Americoal Corp. v. Boone County Water and Sewer Dist.* (Ky. PSC Jan. 16, 1992).

⁷ WSCKY does not define private fire hydrant in its tariff. Commission Staff has been unable to locate a definition for such hydrants in the Commission's regulations or in any Kentucky statute. In discussing private hydrants, one state utility commission offered the following definition: "They are called private fire hydrants rather than public fire hydrants because they are installed at the request of and at the expense of the company's customers, whose premises are protected by the adjacent location of the fire hydrant." *Re Village Water Co. of Simsbury*, 81 PUR NS 148, 159 (Conn. PUC 1949).

⁸ WSCKY Tariff, P.S.C.KY. No. 3, Sheet 41. The filed rate schedules also provide for advanced billing for private fire service and the provision of free water service to fire departments for fire protection and training purposes.

⁹ *Id.* at Sheets No. 17-18.

fire hydrant service to the Ambleside Subdivision. KRS 416.140(1)¹⁰ granted WSKY and its predecessors in interest the right to construct and maintain facilities in the public road right-of-way. Bell County Fiscal Court's acquisition of the ownership of the public road did not create an interest in any water utility facilities located on the right-of-way nor did it impose any obligation to pay for services rendered by the water utility. Ambleside has provided Commission Staff no documentary evidence to suggest that Bell County Fiscal Court's assumption of responsibility for fire protection service to the Ambleside Subdivision was an express condition to the dedication of the land as a public roadway.

Locating a fire hydrant on a public road right-of-way is similar to locating a private water meter on such a right-of-way. A fire hydrant and a water meter are water utility equipment. Locating a water meter on a county road right-of-way to establish service for a customer does not render the county government responsible for the cost of the water service to the private customer. To suggest otherwise would have significant consequences for many county governments and rural water utilities.

While KRS 67.083(3)(u) authorizes county fiscal courts to provide for fire protection, no statute expressly requires fiscal courts to provide fire protection services. No evidence has been provided to Commission Staff that suggests that Bell County Fiscal Court expressly agreed to assume financial responsibility for the private fire hydrants or required the installation of the fire hydrants in question. Absent Bell County Fiscal Court's expressed or implied consent or a county ordinance placing the obligation for fire protection services on county governments, Commission Staff is of the opinion that WSKY may not impose on or impute to Bell County Fiscal Court financial responsibility for fire protection services provided to the Ambleside Subdivision.¹¹

¹⁰

Subject to the provisions of subsections (2) and (3) of this section, any person authorized under the laws of this state to conduct the business of producing or supplying water, electricity, gas or gasoline for purposes of light, heat, domestic use or power, or who is engaged in the business of the transmission or sale of water, electricity, gas or gasoline for such purposes, the aforesaid businesses being for a public purpose, may construct and maintain transmission or distribution lines, including placing and maintenance of pipes, poles, wires, crossarms and all other equipment incident thereto, for use in the transmission and sale of such water, electricity, gas or gasoline under, on, along or over any right-of-way used as a state highway, county road, public way or dedicated road outside the limits of a city, and over, under or across any of the waters of this state outside the limits of a city, and may construct and maintain along any right-of-way used for purposes of such state highway or county road all erections and appliances that are necessary to transform, convert and apply such water, electricity, gas or gasoline to the public purposes of lighting, heat, domestic use or power and to distribute and deliver it to the consumers.

¹¹ See *Sheridan Acres Water Co. v. Douglas County*, 688 P.2d 297 (Nev. 1984) (holding that county government is responsible for fees related to fire hydrants only when it has requested hydrants or requires fire hydrants to be installed); *Suffolk County Water Auth. v. Bd. of Fire Comm'rs, Centerport Fire Dist.*, 449 N.E.2d 1269 (N.Y. 1983); *Arcade County Water Dist. v. Arcade Fire Dist.*, 85 Cal.Rptr. 737 (Cal.App. 1970).

Ambleside's continued refusal to pay WCKY for fire protection services may result in the termination of such service. As noted in PSC Staff Opinion 2010-016, Public Service Commission regulations permit WCKY to discontinue water service for any failure to pay outstanding fees for private hydrant services.¹² Commission Staff respectfully recommends that, should Ambleside maintain its current position of refusing to pay such fees, it consider discussions with Bell County Fiscal Court regarding its assumption of responsibility for such services or the formation of a fire protection district¹³ that could assume the responsibility for private hydrant fees.

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, Executive Advisor/Attorney, at (502) 564-3940, Extension 259.

Sincerely,



Jeff Derouen
Executive Director

Enclosures

¹² See also Case No. 2007-00450, *Petition of Kentucky-American Water Co. for Permission and Authorization to Disconnect Customers for Non-Payment of Fire Service Charges* (Ky. PSC Feb. 28, 2008).

¹³ See KRS 75.010-.270.