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January 9, 2012

Donald T. Prather, Esq.
Mathis, Riggs, & Prather, P.S.C.
500 Main Street, Suite 5
Shelbyville, Kentucky 40065

Re: Applicability of KRS 278.460(1)

PSC STAFF OPINION 2013-001

Dear Mr. Prather:

This letter responds to your letter of December 26, 2012 in which you requested an opinion regarding the applicability of KRS 278.460(1) to water districts and water associations. This opinion represents Commission Staff's interpretation of the law as applied to the facts presented, is advisory in nature, and is not binding on the Public Service Commission should the issues herein be formally presented for Commission resolution.

KRS 278.460 addresses the rate of interest that a utility must pay on deposits to secure payment for utility service. Prior to July 12, 2012, KRS 78.460 provided in part:

(1) Except as provided in subsection (2) of this section, a utility shall pay interest at six percent (6%) annually on amounts required to be deposited by patrons to secure utility service.

(2) No water district organized under KRS Chapter 74 nor water association organized under KRS Chapter 273 shall pay interest that exceeds the rate it receives in interest, nor shall the interest payable to the customer at any time exceed six percent (6%) annually on amounts required to be deposited by patrons to secure water accounts.

In its 2012 Regular Session, the Kentucky General Assembly enacted House Bill 399, which amended KRS 278.460(1) to read:

Except as provided in subsection (2) of this section, a utility, including an electric cooperative organized under KRS Chapter 279, shall pay interest on amounts required to be deposited by patrons to secure utility service. The commission shall calculate the interest rate on an annual basis by averaging the one (1) year constant maturity treasury rate from September, October, and November, and shall notify utilities in December of each year of the interest rate to be paid by utilities for the following calendar year.¹

Following the enactment of House Bill 399, the Public Service Commission published a notice² on its website of the revisions and of its calculation of the interest rate that the amended statute required. In this notice, the Public Service Commission stated: "While this new law is a change for most utilities, it does not apply to water districts and water associations, who will continue to pay interest on deposits in accordance with KRS 278.460(2)." When it published its notice of the required interest rate on customer deposits for calendar year 2013, the Public Service Commission again noted that the calculated interest rate would **not** apply to water districts and water associations.³

In your letter of December 26, 2012, you take issue with the position that KRS 278.460(1) was not applicable to water districts and water associations and argue that KRS 278.460(2) merely sets a cap for water districts and water associations from the interest rate which will be calculated in accordance with KRS 278.460(1). You further state that, while this rate cap provision does not have any practical effect in the current low-interest rate environment, it will affect the interest rate that a water district or water association pays if the one (1) year constant maturity treasury rate rises above six percent or the interest rate that the water district or water association receives on its own funds.

Your letter presents the following question: Does KRS 278.460(1) require a water district or water association to pay the Public Service Commission calculated interest rate on customer deposits unless that rate exceeds six percent or the interest rate that the water district or water association receives on its own funds?

¹ 2012 Ky. Acts. 515.

² http://psc.ky.gov/agencies/psc/hot_list/07-12-2012.pdf (posted July 12, 2012) (last viewed Jan. 6, 2013)

³ http://psc.ky.gov/agencies/psc/hot_list/12-04-2012.pdf (posted Dec. 4, 2012) (last viewed Jan. 6, 2013) ("It should be noted that the revision in the statute does not affect water districts and water associations as those utilities will continue to pay interest on deposits in accordance with KRS 278.460(2).").

KRS 278.460(1) plainly requires utilities to pay the Public Service Commission calculated interest rate on customer deposits. No limiting language appears on the face of this statute. It contains no explicit reference to or overt exclusion of water districts or water associations. Instead, KRS 278.460(1) refers to utilities in general. Conversely, KRS 278.460(2) refers unambiguously and solely to water districts and water associations. KRS 278.460(2) states that a water district or association shall not pay an interest rate that exceeds the rate at which it receives interest or a rate in excess of 6 percent per annum.

A “utility” is defined, *inter alia*, as:

any person except . . . a city, who owns, controls, operates, or manages any facility used or to be used for or in connection with . . . [t]he diverting, developing, pumping, impounding, distributing, or furnishing of water to or for the public, for compensation.⁴

Both water districts and water associations are “persons”⁵ and thus meet the statutory definition of utility.⁶

Absent an ambiguity, the plain meaning of a statute should be applied.⁷ KRS 278.460(1) requires all utilities to pay the Public Service Commission calculated interest rate on customer deposits. Therefore, as water districts and water associations are utilities, KRS 278.460(1) is applicable to them. KRS 278.460(2) does not set a separate interest rate for water utility deposits, but merely creates a two-tier limitation upon the maximum interest rate that water districts and water associations must pay. The divergence between subsections is apparent through the institution of a formula to calculate interest in subsection (1), whereas subsection (2) only provides two interest rates, one fixed and one variable, on deposits for water districts and associations that shall not be exceeded. Subsection (2) works exclusively to modify and limit subsection

⁴ KRS 278.010(3)(d).

⁵ KRS 278.010(2) defines a “person” as including natural persons, partnerships, corporations, and two (2) or more persons having a joint or common interest.” “Corporations” include “private, quasipublic, and public corporations, and all boards, agencies, and instrumentalities thereof, associations, joint-stock companies, and business trusts.” As a water district is a public corporation, *see, e.g., Valla v. Preston St. Road Water Dist. No. 1 of Jefferson County*, 395 S.W.2d 772 (1965), it is a person. The same is true for a water association, which is a non-profit corporation organized pursuant to KRS Chapter 273.

⁶ The General Assembly has also expressly declared water associations and water district to be public utilities and subject to 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. KRS 278.012; KRS 278.015.

⁷ *Fayette County v. Hill*, 201 S.W.2d 886, 889 (Ky. App. 1947).

(1) without setting an alternative interest rate. Thus, subsection (2) does not conflict with or have supremacy over subsection (1) in regard to the base rate of interest that a water district or association must pay except as a shield against rates in excess of the lesser of the rate it receives or six percent.

This interpretation is consistent with the statutory history of KRS Chapter 278, which suggests that the General Assembly sought to ensure that non-profit water districts and water associations did not pay a rate of interest on customer deposits that exceeds the rate that other utilities pay. In 1932, two years before the enactment of the Public Service Commission Act, the General Assembly enacted the first statute requiring public utilities to pay interest on customer deposits. This statute provided:

[P]ublic utilities, such as gas, electric and water companies shall be required to pay holders of certificates of deposits six (6) per cent annually on amounts exacted from patrons for gas, electric and water accounts.⁸

At some point in time following the enactment of the Public Service Commission Act,⁹ this provision was codified as KRS 278.460. It remained unchanged until 1994. In 1990, well after it placed water districts and water associations under Public Service Commission jurisdiction,¹⁰ the General Assembly added sections to KRS Chapters 74 and 273 to place ceilings on the rate of interest that water districts and water associations must pay on customer depositions.¹¹ In 1994 the General Assembly

⁸ 1932 Ky. Acts 331.

⁹ 1934 Ky. Acts 580.

¹⁰ The General Assembly declared water districts to be public utilities in 1964 and water associations in 1972. See 1964 Ky. Acts 722; 1972 Ky. Acts 1462.

¹¹ 1990 Ky. Acts 740. The revision created KRS 74.085, which provided:

A water district organized under this chapter shall pay interest at a rate no greater than it receives in interest and at no time shall the interest payable to the customer exceed six percent (6%) annually on amounts required to be deposited by patrons to secure water accounts.

It also created KRS 273.392, which provided:

A water association formed for the purpose of furnishing water services to the general public pursuant to this chapter shall pay interest at a rate no greater than it receives in interest and at no time shall the interest payable to the customer exceed six percent (6%) annually on amounts required to be deposited by patrons to secure water accounts.

Donald T. Prather, Esq.
January 9, 2013
Page 5

repealed these provisions and amended KRS 278.460 to include these ceilings.¹² This version of KRS 278.460 remained in effect until the enactment of House Bill 399 in the 2012 Regular Session. The 1990 and 1994 amendments required a water district or water association to pay a rate of interest on customer deposits equal to the lesser of that which it earned on its deposits or six percent. All other utilities were to pay an interest rate of six percent. At no time would a water district or water association pay a rate of interest greater than other types of utilities.

The interpretation set forth in Public Service Commission's recent notices would produce a contrary result. According to that interpretation, if the Public Service Commission calculated interest rate on customer deposits was less than the rate that a water district or water association earned on its own bank deposits, the water district or association may pay an interest rate on its customer deposits that is greater than the rate paid by a utility that is not a water district or water association.

Based upon the foregoing analysis, Commission Staff is of the opinion that, subject to the limitations in KRS 278.460(2), all utilities are required to pay interest on deposits at the same rate as ordered by KRS 278.460(1) and as calculated by the Public Service Commission. Should the Public Service Commission calculated interest rate on customer deposits exceed either six percent or the interest rate that a water district or water association receives on its own bank deposits, then the water district or water association will pay a rate of interest equal to the lower of six percent or the interest rate obtained on its own bank deposits. The Public Service Commission will revise the published notice to reflect the findings of this opinion.

Questions concerning this opinion should be directed to Jonathan Beyer, Staff Attorney, or Gerald Wuetcher, Executive Advisor/Attorney, at (502) 564-3940.

Sincerely,



Jeff Derouen
Executive Director

¹² 1994 Ky. Acts 567. This revision corrected a significant problem with the 1990 amendments. Because KRS 278.012 and KRS 278.015 provided that the provisions of KRS Chapter 278 would control in the event of a conflict with KRS Chapter 74 or 273, the earlier revisions failed to provide any relief to water districts or water associations from the six percent interest rate specified in KRS 278.460.