

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF BULLITT COUNTY SANITATION)	
DISTRICT AS RECEIVER FOR THE ASSETS OF)	CASE NO.
BULLITT UTILITIES, INC. FOR A CERTIFICATE OF)	2014-00255
CONVENIENCE AND NECESSITY AND SURCHARGE)	
FOR SAME)	

ORDER

On December 9, 2015, the Attorney General of the Commonwealth of Kentucky (“AG”) and the Bullitt County Sanitation District, as Receiver for the assets of Bullitt Utilities, Inc. (“BCSD, as Receiver”) filed a Joint Motion to Dismiss Application for a Surcharge (“Joint Motion”).¹ The AG and BCSD, as Receiver, were the only parties to the proceeding.² On December 15, 2016, the Commission entered an Order that dismissed the surcharge application without prejudice and removed the case from the Commission’s docket.³

On January 4, 2016, Robert W. Keats, not individually but as interim Chapter 7 Trustee (“Trustee”) for the bankruptcy estate of Bullitt Utilities, Inc. (“Bullitt Utilities”), filed his Application of the Interim Chapter 7 Trustee for Bullitt Utilities, Inc., Under KRS 278.400 for Rehearing of Order Granting Joint Motion to Dismiss Application for a Surcharge (“Motion for Rehearing”). On January 6, 2016, the Trustee filed his

¹ Order (Ky. PSC Dec. 15, 2015) at 1.

² On October 16, 2015, the Commission dismissed Bullitt Utilities, Inc. as the applicant in this case (Ky. PSC Oct. 16, 2015), Order.

³ Order (Ky. PSC Dec. 15, 2015) at 4.

Supplemental Motion of the United States Bankruptcy Trustee for Reconsideration/Rehearing of Motion to Dismiss Bullitt Utilities' Application for Surcharge ("Supplemental Motion for Rehearing") and also his Motion of the United States Bankruptcy Trustee for Intervention ("Trustee's Motion for Intervention").

On January 21, 2016, the Commission entered an Order that granted the Trustee's Motion for Rehearing and Supplemental Motion for Rehearing for the limited purposes of considering legal issues, particularly "whether Bullitt Utilities now has any legal rights as a utility which can be asserted by the Trustee and whether the Commission can grant any relief absent modification or amendment of the Franklin Circuit Court's order appointing BCSD as receiver for the assets of Bullitt Utilities."⁴

Following a careful review of the pleadings filed by the Trustee and the parties as well as the pertinent statutes and case law, the Commission makes the following findings.

BACKGROUND

Summary of Events Prior to Bankruptcy

On July 17, 2014, Bullitt Utilities tendered for filing a Petition for Certificate of Convenience and Necessity ("CPCN") and for Surcharge. The case resulted from a catastrophic failure of the steel aeration tank at Bullitt Utilities' Hunters Hollow wastewater treatment plant ("WWTP") on March 29, 2014.⁵ On December 23, 2014, the Commission entered an Order which granted Bullitt Utilities a CPCN to construct a lift

⁴ Order (Ky. PSC Jan. 21, 2016) at 12 and 13.

⁵ Order (Ky. PSC Oct. 16, 2015) at 1.

station, install a line connecting the Hunters Hollow collection system to BCSD's wastewater treatment system, and install two flow meters.⁶

Through the application for a surcharge, Bullitt Utilities proposed to recover costs incurred as the result of the failure and also costs to build new facilities.⁷ After the grant of the CPCN, and while the surcharge portion of the request was pending, Bullitt Utilities filed a request on August 21, 2015, to abandon its property. On August 24, 2015, the Commission opened an investigation into Bullitt Utilities' request to abandon.⁸ From the Commission's August 31, 2015 Order in the abandonment proceeding:

During the August 27, 2015 hearing, Christopher G. Cogan testified that he represented Carroll F. Cogan through a Power of Attorney, that Carroll [F] Cogan is the sole shareholder of Bullitt Utilities, and that the Power of Attorney Authorized him to act on behalf of Bullitt Utilities. The Commission finds that Christopher G. Cogan is authorized to act on behalf of Bullitt Utilities' sole shareholder, Carroll F. Cogan.

Christopher G. Cogan testified that: 1) he authorized Counsel for Bullitt Utilities to send the August 21, 2015 notice regarding abandonment to the Commission's Executive Director; 2) Bullitt Utilities unconditionally disclaims, renounces, relinquishes, or surrenders all property interests or all right to utility property, real or personal, necessary to provide service; and 3) Bullitt Utilities authorized sending to the Commission the August 21, 2015 notice of intent to abandon the operation of the facilities used to provide service.⁹

⁶ Order (Ky. PSC Dec. 23, 2014) at 8.

⁷ *Id.* at 1.

⁸ Case No. 2015-00290, *Bullitt Utilities, Inc.'s Notice of Surrender and Abandonment of Utility Property* (Ky. PSC Aug. 24, 2015).

⁹ *Id.*, (Ky. PSC Aug. 31, 2015) at 5 (footnotes in the original omitted).

By an Order entered August 31, 2015, in Case No. 2015-00290, the Commission found that Bullitt Utilities had carried its burden and met the requirements of KRS 278.021(2)(a) and (b), and the Commission made a finding of abandonment.¹⁰ Bullitt Utilities did not seek rehearing or judicial review of that Order.

On September 1, 2015, the Commission, pursuant to KRS 278.021, filed a Complaint in the Franklin Circuit Court seeking an order attaching the assets of Bullitt Utilities and placing those assets under the sole control and responsibility of BCSD, as Receiver.¹¹ On September 23, 2015, the Franklin Circuit Court entered an order attaching the assets of Bullitt Utilities, appointing BCSD the receiver for the assets of Bullitt Utilities, and placing those assets under the sole control and responsibility of BCSD. The Franklin Circuit Court authorized BCSD as “receiver to take charge, preserve, operate, control manage, maintain, and care for Bullitt Utilities’ sewage collection and treatment facilities.”¹² The Court further authorized BCSD “to collect all receivables and profits, and to exercise generally the powers conferred by this [Franklin Circuit] Court and such other powers as are usual and incidental to the management of a public utility providing sewage collection and treatment service to the public.”¹³

On October 16, 2015, following the Franklin Circuit Court’s order attaching the assets of Bullitt Utilities and appointing BCSD as receiver for those assets, we made the following findings regarding Bullitt Utilities.

¹⁰ *Id.*

¹¹ *Public Service Commission of Kentucky v. Bullitt Utilities, Inc.; Commonwealth of Kentucky, Acting through and by the Energy and Environment Cabinet; and Bullitt County Sanitation District*, Franklin Circuit Court, Civil Action No. 15-CI-946 (filed Sept. 1, 2015).

¹² *Id.*, (Franklin Cir Ct. Sept. 23, 2015) at 1.

¹³ *Id.*

[W]e find that BCSD, as receiver, has been vested by the Franklin Circuit Court with sole control and responsibility for the assets of Bullitt Utilities. Further, we find that BCSD, as receiver, is the only entity that has authority to collect the rates and charges to the customers served by the Hunters Hollow collection system, the former customers of Bullitt Utilities. Pursuant to KRS 278.021(6), KRS 278.021(7), and the Franklin Circuit Court's September 23, 2015 Order, BCSD, as receiver, is the only entity with authority to bring or defend any action regarding the assets and operations of the Hunters Hollow collection system. The Commission finds that BCSD should be substituted in place of Bullitt Utilities as the applicant in this proceeding.

We further find that the style of this proceeding should be revised in order to reflect the substitution of BCSD, as receiver, for Bullitt Utilities. We find that BCSD, as receiver, should file an adoption notice of the tariffs of Bullitt Utilities.¹⁴

The Commission ordered: 1) BCSD, as receiver, substituted for Bullitt Utilities as the applicant in this case; 2) Bullitt Utilities dismissed as the applicant; and 3) Bullitt Utilities dismissed as a party to this case and removed from the service list.¹⁵ Through the same Order, we also addressed the post-abandonment status of Bullitt Utilities with regard to the pending surcharge application. Specifically, we stated:

If Bullitt Utilities seeks to further participate in this case, it is required, per 807 KAR 5:001, Section 4(11)(a), to file a motion requesting leave to intervene in the proceeding. The motion shall state its "interest in the case and how intervention is likely to present issues or develop facts that will assist the commission in fully considering the matter without unduly complicating or disrupting the proceeding."¹⁶

Bullitt Utilities did not file a rehearing request or appeal of the Commission's October 16, 2015 Order.

¹⁴ Order (Ky. PSC Oct. 16, 2015) at 5 (footnotes omitted).

¹⁵ *Id.* at 6.

¹⁶ *Id.* at 5 (footnote omitted).

On December 9, 2015, the AG, an intervenor in this case, and BCSD, as Receiver, filed a Joint Motion to Dismiss Application for a Surcharge ("Joint Motion"). On December 15, 2015, the Commission entered an Order that granted the motion and dismissed, without prejudice, the then-pending surcharge application.

Summary of Events Post-Bankruptcy

On January 4, 2016, the Trustee filed a Motion for Rehearing, on behalf of the bankruptcy estate of Bullitt Utilities, requesting rehearing of the Commission's Order dismissing the surcharge application.¹⁷ The Trustee attached to his Application for Rehearing the Bankruptcy Court's December 29, 2015 Order Granting Emergency Motion of the Petitioning Creditors Under 11 U.S.C. §§ 105(a) and 303(g) for Order Directing Appointment of Interim Trustee ("Order Granting Appointment"). Among other things, the Order Granting Appointment states:

An interim trustee shall immediately be appointed under section 303(g) of the Bankruptcy Code and shall have full authority and control over the surcharge claim and any related claims in the possession of the Alleged Debtor [Bullitt Utilities]. The interim trustee shall promptly review the surcharge claim and the Surcharge Case, and then will make a determination regarding whether to reinstate the Surcharge Case, appeal the Surcharge Case or reassert the Surcharge Case.¹⁸

On January 6, 2016, the Trustee filed both a Supplemental Motion for Rehearing and the Trustee's Motion for Intervention. On January 11, 2016, the AG and BCSD, as Receiver, filed a Joint Response to the Filings of the U.S. Bankruptcy Trustee ("Joint

¹⁷ On December 30, 2015, the Trustee filed his Notice of Bankruptcy Having Been Filed ("Trustee's Notice") with the Franklin Circuit Court in Civil Action No. 15-CI-00946. The Trustee's Notice includes the following statement: "The filing of a bankruptcy case automatically stays collection and all other actions concerning the debtor and the debtor's property."

¹⁸ Motion for Rehearing, Exhibit A, Order Granting Appointment (filed Jan. 4, 2016).

Response to Trustee”). On January 13, 2016, the Trustee filed his Reply of the Bankruptcy Trustee to Response of The Kentucky Attorney General to Trustee’s Motion to Intervene.

On January 21, 2016, the Commission entered an Order that granted the Trustee’s Motion for Rehearing and Supplemental Motion for Rehearing for the limited purpose of “determining whether Bullitt Utilities now has any legal rights as a utility that can be asserted by the Trustee and whether the Commission can grant relief absent modification or amendment of the Franklin Circuit Court’s order appointing BCSD as receiver for the assets of Bullitt Utilities.”¹⁹ By the same Order, we required the Trustee to file a brief addressing the legal issues identified in the Order and granted BSCD, as Receiver, and the AG an opportunity to file a response to the Trustee’s brief.²⁰ We deferred a ruling on the Trustee’s Motion for Intervention.²¹

On January 29, 2016, the Trustee filed his response to the Commission’s January 21, 2016 Order. On February 22, 2016, the AG filed written comments to the Trustee’s response. On March 10, 2016, an informal conference was held at the Commission’s offices.

DISCUSSION

As the Trustee acknowledges, the Trustee does not possess any rights greater than those rights held by Bullitt Utilities at the time of commencement of the bankruptcy

¹⁹ Order (Ky. PSC Jan. 21, 2016) at 12.

²⁰ *Id.* at 13.

²¹ *Id.*

proceeding.²² We therefore must consider the Trustee's Motion for Rehearing and the Trustee's Motion for Intervention in light of Bullitt Utilities' right to the relief requested therein by the Trustee. Because Bullitt Utilities would not be entitled to a rehearing or to intervene, we find that the Trustee's motions should be denied.

Motion for Rehearing

Following the Franklin Circuit Court's appointment of BCDS as receiver of Bullitt Utilities assets in Civil Action No. 15-CI-00946, we found by Order entered on October 16, 2015, that Bullitt Utilities no longer had any right or standing to continue with its application in this case. Accordingly, we substituted BCSD, as receiver, as the applicant, and dismissed Bullitt Utilities as a party to this case. Bullitt Utilities did not seek a rehearing of that Order or seek judicial review thereof within the time permitted by statute. Thus, under Kentucky law, the Commission's dismissal of Bullitt Utilities as a party to this case is no longer subject to challenge.

Motions for rehearing of Commission orders are governed by KRS 278.400.

That statute provides in pertinent part:

After a determination has been made by the commission in any hearing, any party to the proceeding may, within twenty (20) days after the service of the order, apply for a hearing with respect to any of the matters determined.

The plain language of the statute limits the right to apply for a rehearing to "any party." Because Bullitt Utilities was not a party to the proceeding when the Commission entered its December 15, 2015 Order, it could not apply in its own right for a rehearing of the Order dismissing the surcharge application. As the Trustee steps into the shoes of Bullitt Utilities, we find that the Trustee is likewise precluded from seeking a rehearing.

²² Response of the Chapter 7 Trustee for Bullitt Utilities, Inc. to the Commission's January 21, 2016 Order (filed Jan. 29, 2016) ("Trustee Response to Order") at 7.

Moreover, even if Bullitt Utilities were still a party in this case, Bullitt Utilities would not be entitled to a rehearing of the order dismissing the surcharge application. Bullitt Utilities voluntarily abandoned its utility assets and lost its right seek a surcharge prior to the institution of bankruptcy proceedings.²³ By order of the Franklin Circuit Court, Bullitt Utilities' abandoned assets were placed in the exclusive possession and control of BCSD, as receiver. As a state agency and a party to the receivership case, we are bound to follow the order of the Franklin Circuit Court.

We find that the Bankruptcy Court has exclusive jurisdiction over Bullitt Utilities' assets and that the Bankruptcy Court's Order entered December 29, 2015, granted the Trustee "full authority and control over the surcharge claim and any related claims in the possession of the Alleged Debtor." [emphasis added.] However, as of that date, Bullitt Utilities had abandoned all interests in its utility assets, which were then under the control and in possession of BCSD as receiver by Order of the Franklin Circuit Court, and the surcharge application had been dismissed.

While Bullitt Utilities was not entitled to a rehearing or to intervene in its own right in the instant case, nothing herein should be construed to prohibit the Trustee from requesting the Franklin Circuit Court to withdraw its September 23, 2015 Order appointing BCSD as receiver and thereby return to Bullitt Utilities possession and control of the sewer assets it formerly controlled, including the right to seek a rate surcharge. Alternatively, nothing herein should be construed to prohibit the Trustee

²³ As noted, we found in Case No. 2015-00290, *Bullitt Utilities, Inc.* (Ky. PSC Aug. 31, 2015), that Bullitt Utilities had met the statutory requisites for abandonment of utility assets, and that abandonment would be considered effective upon appointment of a receiver of Bullitt Utilities' assets. That case is now closed, and our orders from that proceeding are final. No party sought judicial review of our finding of abandonment.

from seeking an order from the Bankruptcy Court transferring possession and control of these assets from BCSD, as receiver, to the Trustee.

The Commission finds itself in the middle of a dispute that can be resolved only by action of either the Bankruptcy Court or the Franklin Circuit Court. The Commission is not a party to the bankruptcy proceeding. The only order of the Bankruptcy Court filed by the Trustee with the Commission is the Order Granting Appointment. We find that, by reference to the Order Granting Appointment, it is not clear to the Commission whether the Bankruptcy Court has appointed the Trustee to take control of the property of the estate in the possession of BCSD, as Receiver, and to operate any business of Bullitt Utilities, or whether the authority of BCSD as receiver terminated upon appointment of the Trustee. Simply stated, the full extent of the Trustee's authority is not clear in the record, and we urge the Trustee to seek clarification from the Bankruptcy Court, the Franklin Circuit Court, or both.

If, as the Trustee asserts, "the Bankruptcy Court Order has divested BCSD of its power to control BU [Bullitt Utilities] and its assets, including the surcharge claim,"²⁴ then it is not clear in this record who has responsibility for the day-to-day operations of the Hunters Hollows collection system and who is accountable for the continuation of service. Thus, the Trustee should seek clarification as to whether BCSD now has any power to act with respect to the Hunters Hollows collection system. If BCSD has power to act, the Bankruptcy Court or the Franklin Circuit Court should fully describe the power and its limits. The Commission has jurisdiction over the rates and service of the Hunters Hollow collection system. There are over 700 customers now being provided wastewater service by BCSD as receiver, and that service is essential to those

²⁴ Trustee Response to Order at 6.

customers' ability to continue to reside in their homes. The Commission's jurisdiction over service is a regulatory power, and the Commission should not be required to speculate as to who is accountable for service to the customers of the Hunters Hollow collection system.

Motion to Intervene

Pursuant to 807 KAR 5:001, Section 4(11)(a), a person requesting leave to intervene is required to file a request in writing, which "shall state his or her interest in the case and how intervention is likely to present issues or develop facts that will assist the commission in fully considering the matter without unduly complicating or disrupting the proceedings."²⁵ The Commission's regulations further provide:

The commission shall grant a person leave to intervene if the commission finds that he or she has made a timely motion for intervention and that he or she has a special interest in the case that is not otherwise adequately represented or that his or her intervention is likely to present issues or to develop facts that assist the commission in fully considering the matter without unduly complicating or disrupting the proceedings.²⁶

The Trustee does not address the requirements for intervention in his Motion to Intervene. In his response to the Commission's order of January 21, 2016, the Trustee states that his "intervention in this case has already occurred by operation of law and needs no affirmative act from the PSC."²⁷

The Trustee did not cite any authority to support the assertion that his intervention into a case to which Bullitt Utilities is not a party occurred by operation of

²⁵ 807 KAR 5:001, Section 4(11)(a).

²⁶ *Id.*, Section 4(11)(b).

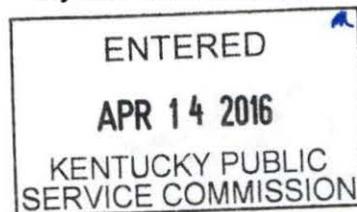
²⁷ Trustee Response to Order at 8.

law, and we are constrained to follow our regulations that govern intervention. We find that the Trustee has failed to articulate a "special interest" in this case, and that the interest he does assert is that of Bullitt Utilities. As discussed above, Bullitt Utilities was dismissed as a party by an Order that is no longer subject to challenge. We find that the Trustee's motion to intervene cannot circumvent the dismissal of Bullitt Utilities from this case, and consequently his motion should be denied.

IT IS THEREFORE ORDERED that:

1. The Trustee's Motion for Rehearing of the Order granting the Joint Motion of the AG and BCSD to dismiss the surcharge application without prejudice is denied.
2. The Trustee's Motion to Intervene is denied.
3. This case is dismissed without prejudice and is removed from the Commission's docket.

By the Commission



ATTEST:

Carole D. Guernsey

Acting Executive Director

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