

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

KENTUCKY INFRASTRUCTURE AUTHORITY'S)
JOINT APPLICATION ON BEHALF OF CERTAIN)
WATER DISTRICTS FOR AUTHORITY TO) CASE NO. 2005-00058
BORROW FUNDS TO REFINANCE CERTAIN)
INDEBTEDNESS TO THE KENTUCKY)
INFRASTRUCTURE AUTHORITY)

ORDER

The Kentucky Infrastructure Authority (“KIA”), on behalf of 27 water utilities, has applied for retroactive authority to issue evidences of indebtedness. Finding that KIA lacks the authority to make this application for 5 of these utilities and that the Commission may not retroactively approve the issuance of evidences of indebtedness, we deny the application.

KIA is a public corporation and state agency with the statutory duty to assist governmental agencies in the construction and acquisition of infrastructure projects.¹ Among its responsibilities is the administration of funding for water infrastructure projects that improve water service within the Commonwealth.

Using funds from its Fund C Infrastructure Revolving Fund, KIA previously entered into loan agreements with these utilities to finance infrastructure improvements to their water distribution and treatment facilities. In 2004 KIA issued approximately \$42,570,000 of Kentucky Infrastructure Authority Governmental Agencies Program

¹ KRS 224A.030.

Revenue Bonds, Series A/B, to refund existing bond obligations related to its Fund C Governmental Agencies Program and to recognize substantial interest savings. KIA entered into Supplemental Assistance Agreements with the water utilities that obligated each water utility to make payments to KIA or a trustee on behalf of KIA in an amount sufficient to repay the principal and interest on the Series 2004 A/B Bonds related to their current loan agreements.

On February 3, 2005, KIA applied to the Commission on behalf of 27 water districts² and 1 sanitation district for authority for those water utilities to enter into Supplemental Assistance Agreements with KIA. In its Application, KIA states that the refunding occurred on July 29, 2004 and that the Agreements were executed with the water districts. Pursuant to a request for information under the Kentucky Open Records Act,³ KIA furnished a copy of each Supplemental Assistance Agreement for 20 of the water districts.⁴ Each of these agreements had been executed on July 1, 2004.

² These water utilities are: Big Sandy Water District, Boyd County Sanitation District 2, Bracken County Water District, Bullock Pen Water District, Caldwell County Water District, Christian County Water District, East Logan County Water District, East Pendleton Water District, Edmonson County Water District, Hardin County No. 2 Water District, Henderson County Water District, Hendron Water District, Jessamine-South Elkhorn Water District, Jonathan Creek Water District, Knott County Water and Sewer District, Laurel County Water District No. 2, Lyon County Water District, Meade County Water District, North Marshall Water District, North Mercer Water District, Oldham County Water District, Ohio County Water District, South Hopkins Water District, Trimble County Water District, Union County Water District, U.S. 60 Water District, and Webster County Water District.

³ Letter from Gerald Wuetcher, Assistant General Counsel, Public Service Commission, to Jody E. Hughes, Executive Director, Kentucky Infrastructure Authority (May 9, 2005).

⁴ Letter from Jody E. Hughes, Executive Director, Kentucky Infrastructure Authority, to Gerald Wuetcher, Assistant General Counsel, Public Service Commission (June 7, 2005).

We first note that the Commission cannot consider the application as it relates to Boyd County Sanitation District. Our jurisdiction extends only to utilities. KRS 278.040(2). Sanitation districts are expressly exempted from Commission jurisdiction. See KRS 278.010(3)(f). See also Boone County Water and Sewer District v. Public Service Commission, 949 S.W.2d 588, 591 (Ky. 1997) (“a sanitation district is not a utility within the context of KRS Chapter 278.”); Oldham County Sanitation District v. Public Service Commission, No. 2001-CA-001482-MR (Ky. App. July 12, 2002).

We further may not address the application as it relates to East Logan County Water District, Edmonson County Water District, Oldham County Water District, South Graves Water District, and U.S. 60 Water District. KRS 278.300(2) requires that any application for authority to issue or assume securities or evidences of indebtedness to “be made under oath, and shall be signed and filed on behalf of the utility by its president, or by a vice president, auditor, comptroller, or other executive officer having knowledge of the matters set forth [in the application] and duly designated by the utility.” Unlike the other 21 water districts which executed specific powers of attorney to KIA by appropriate utility officials, the record contains no evidence of any authority being granted to KIA to act on behalf of these 6 water utilities.

As to the remaining applications, we find that no action can be taken because the utilities have already issued the evidences 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.**

The Supplemental Assistance Agreements are evidences of indebtedness. Every one of the agreements presented to the Commission was executed on or about July 1, 2004 – over 6 months before the presentation of any application for authority to enter the agreement.

KRS 278.300 makes no provision for the Commission to retroactively approve a utility's issuance of evidences of indebtedness. Moreover, to engage in such practice would encourage utilities to enter into unauthorized transactions without obtaining the necessary regulatory approval and then present the transaction to the Commission as a fait accompli. Utilities that have failed to observe the law should not be excused from its requirements.⁵ For these reasons, the Commission has historically refused to retroactively approve a utility's issuance of evidences of indebtedness. See, e.g., Kenton County Water District No. 1, Case No. 91-046 (Ky.PSC Nov. 8, 1991) at 4 (“As

⁵ The Commission notes that the water utilities and KIA failed to comply with KRS 278.300 despite Commission Staff's efforts to ensure their compliance. On July 22, 2004, KIA's Treasurer met with Commission Staff and advised that on July 30, 2004 KIA would issue its Kentucky Infrastructure Authority Governmental Agencies Program Revenue Bonds, Series 2004 A/B. KIA's Treasurer questioned whether Commission approval of these Supplemental Agreements was necessary and whether such approval could be issued before July 30, 2004. Commission Staff advised him that KRS 278.300 required Commission approval of the proposed Supplemental Agreements. It noted that KIA had in 1993 requested on behalf of several water districts Commission approval of revisions to several financing agreements which were required because of the refunding of KIA bond obligations. See Case No. 1993-00101, Kentucky Infrastructural Authority's Joint Application on Behalf of Certain Water Districts (Ky. PSC April 7, 1993). Commission Staff offered to assist KIA by providing a list of the documents needed to support an application for authority to enter the proposed Supplemental Agreements and an application for such approval. Commission Staff provided these documents later on July 22, 2004. On July 26, 2004, KIA submitted a revised draft of the application for Staff's review. KIA's bond counsel informed Staff that the loans would not be finalized until the due date of the first payment, September 1, 2004. After July 26, 2004, Commission Staff made several inquiries by electronic mail to KIA regarding the status of the application.

no purpose will be served by the post-execution approval of these documents, the Commission will not stamp its imprimatur upon these documents.”).

The Commission places KIA and all of the utilities in question on notice that in the future they will be expected to fully comply with KRS 278.300 and to obtain Commission approval prior to the issuance of any securities or evidences of indebtedness. Their failure to meet their statutory responsibilities will subject them to administrative sanctions. See KRS 278.990. We furthermore remind all of the water districts and their officers that they alone bear responsibility for obtaining the necessary approvals for the issuance of indebtedness and cannot abdicate their responsibility to another party – even if that party is a state agency.

IT IS THEREFORE ORDERED that KIA’s Application on behalf of the 27 water utilities is denied.

Done at Frankfort, Kentucky, this 26th day of August, 2005.

By the Commission

ATTEST:


Executive Director