

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF BULLOCK PEN	)	
WATER DISTRICT FOR A DECLARATORY	)	CASE NO.
ORDER PURSUANT TO KAR 807 5:001,	)	2023-00306
SECTION 19	)	

ORDER

On September 15, 2023, Bullock Pen Water District (Bullock Pen District) filed an application for a declaratory order, pursuant to KRS Chapter 278 and 807 KAR 5:001, Section 19, that a Certificate of Public Convenience and Necessity (CPCN) is not required for Bullock Pen District to purchase a certain tract of real estate for future use. No response to Bullock Pen District's application for a declaratory order has been filed pursuant to 807 KAR 5:001, Section 19(4). This application is now before the Commission for a decision.

BACKGROUND

Bullock Pen District is a water district organized under KRS Chapter 74 that provides water service to approximately 7,595 retail customers in Boone, Gallatin, Grant, Kenton, and Pendleton counties.<sup>1</sup> As of December 31, 2022, Bullock Pen District had total net utility plant in service of \$16,430,596 and operating revenues of \$4,570,973.<sup>2</sup>

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<sup>1</sup> Application at 1; *Annual Report of Bullock Pen Water District to the Public Service Commission for The Year Ending December 31, 2022*, (2022 Annual Report) at 12, 27.

<sup>2</sup> 2022 Annual Report at 16, 20.

Bullock Pen District stated in its application that it is in the process of conducting a preliminary investigation for the expansion or replacement of its water treatment plant.<sup>3</sup> Bullock Pen District indicated that the current water treatment plant was constructed in the 1960s, and has a practical treatment capacity between 400,000, and 500,000 gallons per day.<sup>4</sup> Bullock Pen District stated that a preliminary engineering report it obtained to investigate its options indicated that Bullock Pen District needs would be best met with a water treatment plant capable of producing 2,000,000 gallons per day.<sup>5</sup>

Bullock Pen District's current water treatment plant is located on an approximately two acre tract on Bullock Pen Lake. In order to accommodate a new wastewater treatment plant, Bullock Pen District stated it needs to purchase a 12.97 acre parcel of land adjacent to its current water treatment plant (the Catlett Property). Bullock Pen District stated that the Catlett Property primarily consists of extreme topographical features but includes a flat area with a barn and a single family residence on or near which a new water treatment plant would need to be constructed.<sup>6</sup> Bullock Pen District indicated that its engineering firm has recommended purchasing the entire parcel.<sup>7</sup>

Bullock Pen District stated that the current owners of the Catlett Property have agreed to sell it to Bullock Pen District for \$350,000, so long as Bullock Pen District is able to close on the land on or before October 15, 2023.<sup>8</sup> Bullock Pen District stated that

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<sup>3</sup> Application at 2.

<sup>4</sup> Application at 2-3.

<sup>5</sup> Application at 3.

<sup>6</sup> Application at 3

<sup>7</sup> Application at 3.

<sup>8</sup> Application at 3.

it had the land appraised and that the appraisal returned a value of \$290,000.<sup>9</sup> Bullock Pen District indicated that the current owners of the land stated that if Bullock Pen District does not purchase the Catlett Property on or before October 15, 2023, they will list the land on the market at \$400,000.<sup>10</sup> Bullock Pen District also stated that it will use cash it has on hand to fund the purchase, and thus no financing is needed.<sup>11</sup>

Bullock Pen District argued that a CPCN is not required for it to purchase the Catlett Property. Bullock Pen District requested a declaratory order that a CPCN is not necessary for it to purchase the Catlett Property, that it be permitted to purchase the Catlett Property, and that it be permitted to finance the purchase of the Catlett Property from cash reserves that it currently has on deposit.<sup>12</sup>

#### LEGAL STANDARD

Pursuant to 807 KAR 5:001, Section 19, the Commission may, upon application by a person substantially affected, “issue a declaratory order . . . with respect to the meaning and scope of an order or administrative regulation of the commission or provision of KRS Chapter 278.”<sup>13</sup> An application for a declaratory order must:

- (a) Be in writing;
- (b) Contain a complete, accurate, and concise statement of the facts upon which the application is based;
- (c) Fully disclose the applicant’s interest;

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<sup>9</sup> Application at 3.

<sup>10</sup> Application at 3.

<sup>11</sup> Application at 4.

<sup>12</sup> Application at 5.

<sup>13</sup> 807 KAR 5:001, Section 19(1); see also Case No. 2020-00095, *Electronic Application of Kenergy Corp. for a Declaratory Order* (Ky. PSC Mar. 11, 2021), Order at 4-5 (noting that Commission may issue a declaratory order, in its discretion, with respect to the meaning and scope of an order, regulation, or statute if a request is made by a person substantially affected).

- (d) Identify all statutes, administrative regulations, and orders to which the application relates; and
- (e) State the applicant's proposed resolution or conclusion.<sup>14</sup>

Any factual allegation in an application for a declaratory order must be supported by an affidavit or verified.<sup>15</sup> The Commission “may dispose of an application for a declaratory order solely on the basis of the written submissions filed”<sup>16</sup> or may allow for other actions, including additional discovery, to ensure that the record is complete.

KRS 278.020(1) requires a utility to obtain a CPCN from the Commission before it “commence[s] providing utility service to or for the public or begin[s] the construction of any plant, equipment, property, or facility for furnishing” utility service to the public. KRS 278.300 generally prohibits a utility from issuing any securities or evidences of indebtedness, or assuming any obligation or liability in respect to the securities or evidences of indebtedness, without prior approval from the Commission.

### DISCUSSION AND FINDINGS

The goal when interpreting a statute is to effectuate the intent of the General Assembly.<sup>17</sup> A statute should be read in context and under the assumption that the legislature intended it to be read as a whole such that each of its constituent parts have meaning. A statute should be liberally construed to carry out the intent of the legislature.<sup>18</sup>

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<sup>14</sup> 807 KAR 5:001, Section 19(2).

<sup>15</sup> 807 KAR 5:001, Section 19(6).

<sup>16</sup> 807 KAR 5:001, Section 19(8); see also Case No. 2020-00095, March 11, 2021 Order at 4–5 (noting that that Commission has discretion in whether to address an application for a declaratory order).

<sup>17</sup> *King Drugs, Inc. v. Commonwealth*, 250 S.W.3d 643, 645 (Ky. 2008).

<sup>18</sup> *Wilson v. Commonwealth*, 628 S.W.3d 132, 140 (Ky. 2021); see also *University of Louisville v. Rothstein*, 532 S.W.3d 644, 648 (Ky. 2017) quoting *Cosby v. Commonwealth*, 147 S.W.3d 56, 59 (Ky. 2004))(stating that “[w]e have a duty to accord to words of a statute their literal meaning unless to do so would lead to an absurd or wholly unreasonable conclusion.”

However, the language of the statute, as defined by the General Assembly or as generally understood in the context of the matter under consideration, is presumed to reflect the intent of the legislature.<sup>19</sup> “Where legislative intent is apparent on the face of a statute and there is no question as to its meaning, ‘there is no room for construction, liberal or otherwise.’”<sup>20</sup>

The Commission has previously held that the purchase of facilities used to provide utility service to the public may constitute the commencement of utility service, and therefore, require a CPCN even when the purchaser is already providing service to other customers.<sup>21</sup> However, the Catlett Property only contains a house and a barn and is not currently used to provide utility service.<sup>22</sup> Further, there is no evidence that Bullock Pen District would be providing utility service to new customers or service territories in connection with its purchase of the Catlett Property. Thus, the Commission finds that Bullock Pen District would not be commencing utility service, as that phrase is ordinarily used, with its purchase of the Catlett Property.

The question of whether Bullock Pen District would be beginning the construction of any “plant, equipment, property, or facility” with its purchase of the Catlett Property is slightly less clear. Bullock Pen District has retained an engineer to develop a plan to

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<sup>19</sup> *Kindred Healthcare v. Harper*, 642 S.W.3d 672, 680 (Ky. 2022); see also *Revenue Cabinet v. O’Daniel*, 153 S.W.3d 815, 819 (Ky. 2005) (indicating that the plain language of the statute controls unless it is ambiguous).

<sup>20</sup> *Kindred Healthcare*, 642 S.W.3d at 680.

<sup>21</sup> See Case No. 2020-00028, *Electronic Proposed Acquisition by Bluegrass Water Utility Operating Company, LLC of Wastewater System Facilities and Subsequent Tariffed Service to Users Presently Served by Those Facilities* (Ky. PSC June 19, 2020), Order.

<sup>22</sup> It is possible the Bullock Pen District already has easements over the property with water lines used to provide service. However, the Commission would not really consider those lines to be part of what Bullock Pen District would be purchasing, since it presumably already owns or controls them.

address its water needs, the engineer is currently recommending the construction of a plant, and Bullock Pen District is purchasing the property to use it for the construction of the plant. Thus, the purchase of the Catlett Property could arguably be seen as part of preliminary steps beginning construction.

However, the actual construction of Bullock Pen District's water treatment plant is still remote and contingent on a number of factors.<sup>23</sup> Bullock Pen District is apparently moving forward with its purchase of the property now, because the current owner is looking to sell and delay could unnecessarily increase costs. Further, Bullock Pen District's purchase of the Catlett Property does not include the purchase of facilities used to provide utility service. Thus, the Commission finds that Bullock Pen District's purchase of the Catlett Property would not constitute the beginning of the construction of facilities for furnishing utility service.

The Commission's finding is consistent with previous Commission cases addressing similar issues. For instance, in Case No. 2002-00105, the Commission found, without explanation, that "the acquisition of land for a Central Facility does not require a CPCN."<sup>24</sup> The Commission has also noted that a utility purchased of land for future use

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<sup>23</sup> KRS 278.020(1)(e) also seems to contemplate that preliminary engineering work, which would generally be necessary to obtain a CPCN, would not constitute the beginning of construction, because it indicates that the construction must begin within a year or the CPCN is void. If the preliminary engineering work necessary to develop a project marked the beginning of construction, then KRS 278.020(1)(e) would have no effect in every or almost every circumstance.

<sup>24</sup> Case No. 2002-00105, *Application of Northern Kentucky Water District for (A) an Adjustment of Rates; (B) a Certificate of Public Convenience and Necessity for Improvements to Water Facilities if Necessary; and (C) Issuance of Bonds*, (Ky. PSC Oct. 21, 2002) Order.

in a number of case without indicating that a CPCN should have been obtained.<sup>25</sup> Conversely, the Commission has approved the purchase of land as part of an application for a CPCN when the purchase involved a building or facilities that the utility was going to modify and utilize.<sup>26</sup>

For the reasons discussed above, the Commission finds that Bullock Pen District's purchase of the Catlett Property does not require a CPCN pursuant to KRS 278.020(1). Bullock Pen District is specifically cautioned, however, that any work done to the land other than routine maintenance, would be considered part of a construction project and approval of such is not considered a part of this declaration. The Commission further notes, as Bullock Pen District appears to acknowledge, that construction of the water treatment plant likely would require a CPCN.

While Bullock Pen District only requested a declaratory order that it did not require a CPCN to purchase the Catlett Property, it did propose in its application that it be permitted to finance the purchase of the Catlett Property with cash reserves that it

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<sup>25</sup> Case No. 2008-00371, *Application of South Kentucky Rural Electric Cooperative Corporation for a Certificate of Public Convenience and Necessity to Construct a New Headquarters*, (filed on Sep. 5, 2008, the application references the purchased land but did not seek approval for the purchase, the case history does not indicate approval was ever sought; Case No. 2010-00516, *The Application of Big Sandy Rural Electric Cooperative Corporation for a Certificate of Convenience and Necessity Pursuant to KRS 278.020 and 807 KAR 5:001 Section 9 and Related Sections Authorizing Certain Proposed Construction* (Filed on Dec. 2021,2010), Application states that land was purchased for the project prior to seeking the CPCN, no authorization was sought for the land purchase. See Also, Case no 2013-00343, *Application of Salt River Electric Cooperative Corporation for a Certificate of Convenience and Necessity Authorizing Certain Proposed Construction Identified as the Headquarters Construction and District Renovations* (Ky. PSC Oct. 25, 2013), Order, Order references that land was recently purchased for the CPCN, but no approval was sought or granted for the purchase of the land.

<sup>26</sup> Case No. 2016-00392, *Application of North Mercer Water District for a Certificate of Public Convenience and Necessity to Acquire a Building and Make Minimal Adaptations thereto*, (Ky. PSC Dec. 22/2016), Order; see also Case No. 2019-00109, *Electronic Application of CitiPower, LLC for (1) An Adjustment of Rates Pursuant to 807 KAR 5:076; (2) Approval for a Certificate of Public Convenience and Necessity to Purchase Pipeline and Other Related Assets; and (3) Approval of Financing* (Ky. PSC Sept. 27, 2019), Order.

currently has on deposit. The Commission read that statement as indicating that Bullock Pen District did not and does not propose to issue securities or evidences of indebtedness to finance the purchase of the property. If that is the case, then Bullock Pen District would not need approval pursuant to KRS 278.300 to finance the purchase, because approval pursuant to that statute is only required if a utility is seeking to issue securities or evidence of indebtedness.<sup>27</sup> To the extent it is being requested, the Commission declines to issue a broad declaration that Bullock Pen District is permitted to finance the purchase of the Catlett Property from cash reserves, because such a declaration could pertain to any number of legal issues not specifically addressed in the application and over which the Commission may not have jurisdiction. The Commission takes no position regarding whether Bullock Pen District is permitted to do so.

IT IS THEREFORE ORDERED that:

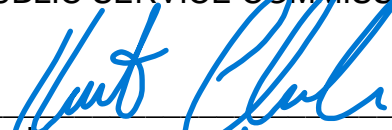
1. Bullock Pen District's request for a declaration that a CPCN is not required to purchase the land Catlett Property is granted.
2. This case is closed and removed from the Commission's docket.

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<sup>27</sup> There are exceptions to this requirement, but they are not discussed, because Bullock Pen District indicated that it is not funding the purchase with securities or debt.



PUBLIC SERVICE COMMISSION

  
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Chairman

  
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Vice Chairman

  
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Commissioner

ENTERED  
OCT 06 2023  
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KENTUCKY PUBLIC  
SERVICE COMMISSION

ATTEST:

  
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