Commonwealth of Kentucky
Before the Public Service Commission

In the Matter of:
APPLICATION OF FARMDALE DEVELOPMENT)
CORPORATION FOR A CERTIFICAT OF) Case No. 2006-00209
CONVENIENCE AND NECESSITY, AUTHORITY)
TO MAKE REPAIRS AND SURCHARGE FOR SAME)

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ATTORNEY GENERAL'S POST-HEARING MEMORANDUM

On 22 May 2006, the Farmdale Development Corporation filed a Petition for a Certificate of Convenience and Necessity seeking Public Service Commission authorization for the replacement of a lift station facility. The Petition also contains a request for authorization of "a surcharge to pay for the replacement of the remote lift station."[1]

On 26 October 2006, a hearing was held on the Petition. The Office of the Attorney General noted that it has no objection to the application for a certificate of convenience and necessity for the lift station, and it further noted its view that the Petition for a certificate is ready for submission.[2] Thus, with regard to the need for the lift station replacement and the corresponding authorization, the matter appears to be otherwise uncontested.

[1] Petition for Certificate of Convenience and Necessity, page 1.
[2] Transcript Evidence for 26 October 2006 Hearing (hereinafter "TE") pages 70, 73, and 80.

What remains in controversy is the proper regulatory cost for the lift station replacement and how to pay for it.[3] It also is the case that there may be an issue relating to Commission approval of a financing proposal; however, because there is no application pursuant to KRS 278.300 pending, the Attorney General declines to provide comment on the merits of a matter that applicant has yet to properly submit to the Commission for approval.

As noted at the hearing, the Attorney General objects to the request for a surcharge made as part of this Petition.[4] Farmdale has a pending application for a rate adjustment, PSC Case No. 2006-00028. Indeed, the surcharge sought in this Petition was initially sought through the application in Case No. 2006-00028 as part of a larger construction surcharge.[5]

Foregoing an exhaustive discussion of the surcharge proposal in the pending application for a rate adjust, the surcharge sought as part of this Petition is outside the scope of authorization available through KRS 278.020. Changes in rates are, in general, made pursuant to KRS 278.180. If the legislature had chosen to afford Farmdale a separate mechanism apart from the traditional rate adjustment mechanism (for which a case is already pending), then it would have chosen to provide Farmdale with a statutory provision such as KRS 278.183, which permits a surcharge to recover certain costs of complying with the Federal Clean Air Act. No such surcharge power exists for Farmdale via KRS 278.020.

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[3] See, for background, TE p. 72.
[4] TE pages 70 and 73.
[5] TE page 13; also see Case No. 2006-00028, 14 June 2006 Motion of Farmdale Development Corporation to file Amendment to Application for Rate Adjustment.

KRS 278.020 provides the Commission with authority to, in this instance, authorize construction. It does not provide additional authority to adjust rates or issue or assume securities, matters falling under separate statutory provisions. Accordingly, consideration of any rate impact is a matter for a separate proceeding. See, for comparison, *South Central Bell v. Utility Regulatory Commission*, 637 S.W.2d 649 (Ky. 1982). Therefore, as noted at the hearing, consideration of the surcharge (which includes consideration of the costs of the project) is a matter that can, and should be, considered in the pending rate case.

Should the Commission opt to provide Farmdale with a surcharge via this proceeding, the Attorney General, objection notwithstanding, notes the following. The Commission should disallow the cost of the project in excess of the cost of the project had Farmdale used reasonable diligence in replacing the remote lift station. Second, the Commission should disallow any recovery of the cost of the 28 November 2006 hearing (other than, perhaps, publication), a second hearing necessitated in order to cure Farmdale's failure to abide by the requirements of this Commission's 10 October 2006 Order and publish notice of the October 26th hearing.

We are told, regarding the lift station, that we do not have time to wait.[6] It is important to point out, however, that the cause of any predicament relating to the remote lift station is the inaction of the Applicant. The horrible condition of

[6] TE page 71.

the lift station does not result from an act of nature such as a lighting strike or any third-party intervention.[7] The lift station suffers from a lack of attention.

While it may be difficult to determine when to replace a lift station,[8] "We are way beyond what would be expected out of this lift station."[9] A typical lift station has a life expectancy of 25 to 30 years,[10] and the facility at issue in this proceeding is approximately 40 years old.[11] In fact, because this is a fiberglass lift station, it is less durable than the majority of lift stations which are concrete.[12]

Thus, **from Applicant's evidence**, there is no reasonable doubt that this facility is at risk for an imminent failure.[13] It is also clear that Mr. Cogan, who makes all of the major decisions regarding the plant,[14] did not visually inspect the lift station "for the last few years" despite the fact that the facility was 10 to 15 years beyond the service life of a typical lift station and even further beyond the service life of a fiberglass facility.[15] Any "crisis" results solely from Mr. Cogan's imprudent actions and lack of diligence regarding the monitoring of this facility and his failures in the decision-making process for the facility's orderly replacement. The ratepayers have no burden to pay any costs above the cost associated with prudent actions.

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[7] TE page 79.
[8] TE page 19.
[9] TE page 18.
[10] TE pages 38 and 62.
[11] TE pages 23 and 24.
[12] TE page 63.
[13] TE pages 35, 36, 53, 54, and 56.
[14] TE page 27.
[15] See also TE page 59, Applicant's arrangement with Mr. Smither did not include inspections of lift station.

The Attorney General submits that the recoverable cost for the replacement facility should be capped at no more than $30,425, the cost per Mr. Smither's Revised Quote of 27 September 2005. Thus, while at present we do not know the final cost of the remote lift station,[16] the costs recoverable as prudently incurred costs were established by no later than the date of the Revised Quote, a date by which it was abundantly clear that the fiberglass lift station had long-since merited replacement.

Per the **Applicant's evidence**, spending money for repairs is not prudent when something needs to be replaced.[17] The natural regulatory corollary for the foregoing premise is that ratepayers have no responsibility to fund an amount in excess of prudently incurred costs. In the absences of a requirement of prudence for cost recovery, the regulatory process shifts all of the risks of imprudent management and lack of diligence from the utility to the ratepayers.

With regard to the potential regulatory recovery of the costs of the second hearing other than publication (e.g. attorney fees, etc.), the principle remains the same. The ratepayers have no responsibility to fund Farmdale's imprudent actions and lack of diligence.

[16] TE page 83.
[17] TE page 57.

WHEREFORE, the Attorney General submits this Post-Hearing Memorandum.

Respectfully submitted,

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Certificate of Service and Filing

Counsel certifies filing of the original and ten photocopies of his Post-Hearing Memorandum by hand delivery to Beth O'Donnell, Executive Director, Public Service Commission, 211 Sower Boulevard, Frankfort, Kentucky 40601; furthermore, service of the filing was by mailing a true and correct of the same, first class postage prepaid, to Robert C. Moore, Hazelrigg & Cox, LLP, P. O. Box 676, Frankfort, Kentucky 40602, all on this 22nd day of November 2006.

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