

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 (“Attorney General”), an intervenor in this case, 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”). On December 15, 2015, the Commission entered an Order that granted the motion and dismissed, without prejudice, the then-pending surcharge application.

On January 4, 2016, Robert W. Keats, not individually but as interim Chapter 7 trustee for the bankruptcy estate of Bullitt Utilities, Inc. (“Trustee”) filed an 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 (“Application for Rehearing”). On January 6, 2016, the Trustee filed a Supplemental Motion of the United States Bankruptcy Trustee for Reconsideration/Rehearing of Motion to Dismiss Bullitt Utilities’ Application for Surcharge (“Supplemental Motion for Rehearing”). On January 6, 2016, the Trustee also filed a Motion of the United States Bankruptcy Trustee for Intervention (“Motion for Intervention”).

On January 11, 2016, the Attorney General and BCSD, as Receiver, filed a Joint Response to the Filings of the U.S. Bankruptcy Trustee (“Joint Response to Trustee”). On January 13, 2016, the Trustee filed a reply to the Joint Response to Trustee. Through this Order we grant a limited rehearing to consider the complex legal issues relating to standing and the extent of the Commission’s jurisdiction as discussed below.

DISCUSSION

On July 17, 2014, Bullitt Utilities, Inc. (“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, 2014.¹ On December 23, 2014, the Commission entered an Order which granted Bullitt Utilities a CPCN to construct a lift station, install a line connecting the Hunters Hollow collection system to BCSD’s wastewater treatment system, and install two flow meters.²

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.³ After the grant of the CPCN, and while the surcharge portion of the request was pending, Bullitt Utilities filed a request to abandon its property. On August 24, 2015, the Commission opened

¹ Order (Ky. PSC July 21, 2015), Appendix, Exhibit 4, Energy and Environment Cabinet, Department for Environmental Protection, Division of Water, Wastewater Inspection Report, dated Apr. 2, 2014.

² Order (Ky. PSC Dec. 23, 2014) at 8.

³ *Id.* at 1.

an investigation into Bullitt Utilities' request to abandon.⁴ 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.⁵

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.⁶

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

⁴ Case No. 2015-00290, *Bullitt Utilities, Inc.'s Notice of Surrender and Abandonment of Utility Property* (Ky. PSC Aug. 24, 2015).

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

⁶ *Id.*

Receiver.⁷ On September 23, 2015, the Franklin Circuit Court entered an order attaching the assets of Bullitt Utilities and appointing Bullitt County Sanitation District 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 to take charge, preserve, operate, control manage, maintain, and care for the Bullitt Utilities sewage collection and treatment facilities. BCSD is also authorized to, among other things, collect all receivables and profits, and to exercise generally the powers conferred by the 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.

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.

[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

⁷ *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).

receiver, for Bullitt Utilities. We find that BCSD, as receiver, should file an adoption notice of the tariffs of Bullitt Utilities.⁸

The Commission ordered that BCSD, as receiver, be substituted for Bullitt Utilities as the applicant in this case; that Bullitt Utilities be dismissed as the applicant; and that Bullitt Utilities be dismissed as a party to this case and removed from the service list.⁹ 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."¹⁰

Bullitt Utilities did not seek a rehearing of the Commission's October 16, 2015 Order and did not file a motion to intervene.

On December 9, 2015, the AG and BCSD, as Receiver, filed their Joint Motion to dismiss the surcharge application without prejudice. The Joint Motion stated that a dismissal without prejudice was warranted due to a substantial change in circumstances since the application for the surcharge was filed.¹¹ The Joint Motion stated that BCSD did not plan to rebuild a wastewater treatment plant at the site of the Hunters Hollow

⁸ Order (Ky. PSC Oct. 16, 2015) at 5 (footnotes omitted).

⁹ Order (Ky. PSC Oct. 16, 2015) at 6.

¹⁰ Order (Ky. PSC Oct. 16, 2015) at 5 (footnote omitted).

¹¹ AG and BCSD, as Receiver, Joint Motion at 1.

Plan or purchase or construct a lift station or new/additional lines at this time.¹² The

Joint Motion stated:

It would not serve the best interests of the customers to pursue any surcharge at this time due to the uncertainty as to a permanent solution and what that may entail as to future rates and services. Further, incurring additional debt for the purchase and/or construction of new facilities and infrastructure would further encumber and expose the assets of the utility, would run counter to BCSD's duty to preserve assets, and would not be in the best interests of the customers.¹³

On December 15, 2015, the Commission entered an Order in which it found that BSCD, as Receiver, has been vested by the Franklin Circuit Court with the power to manage the assets of Bullitt Utilities used in providing sewage collection and treatment service to the public.¹⁴ We found that BCSD did not plan to pursue the construction of facilities for which a CPCN was granted on December 23, 2014.¹⁵ We also found that Bullitt Utilities had abandoned the assets of its Hunters Hollow system, had been dismissed as a party to this proceeding, and had no interest in this proceeding.¹⁶ We determined that BCSD, as Receiver, was the real party in interest, and that these findings constituted good cause for the pending application for a surcharge to be dismissed without prejudice.¹⁷

¹² *Id.* at 2.

¹³ *Id.* at 3.

¹⁴ Order (Ky. PSC Dec. 15, 2015) at 4.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

The Application for Rehearing filed by the Trustee on January 4, 2016, states that Veolia Water Technologies, Inc. (“Veolia”) and Perdue Environmental Contracting Company, Inc. (“PECCo”) had filed an involuntary chapter 7 bankruptcy petition with the United States Bankruptcy Court for the Western District of Kentucky (“Bankruptcy Court”).¹⁸ In support of his application, the Trustee states that he was appointed by the Bankruptcy Court as interim chapter 7 trustee for Bullitt Utilities on December 29, 2015.¹⁹ Per the Trustee, he has been granted “full authority and control over the surcharge claim and any related claims in the possession of [BU].”²⁰

The Supplemental Motion for Rehearing filed by the Trustee on January 6, 2016, states that, per Bullitt Utilities’ post-hearing brief in this case, “approximately 90% of the amount of the surcharge requested by Bullitt Utilities was to pay the extraordinary expenses incurred in responding to the WWTP’s failure and not to construct the wet well and pump station.”²¹ Per the Trustee, the “[t]he requested Surcharge clearly constituted a significant potential asset of Bullitt Utilities, of course, subject to the Commission’s approval.”²² The Trustee adds, “[i]f the Surcharge application is not granted, then the companies/creditors that provided assistance in responding to the failure of the WWTP will not be paid the significant amounts that are due them.”²³

¹⁸ Trustee Application for Rehearing at 1.

¹⁹ *Id.*

²⁰ *Id.* at 1–2.

²¹ Trustee Supplemental Motion for Rehearing at 2.

²² *Id.*

²³ *Id.*

The Supplemental Motion for Rehearing further states that the Franklin Circuit Court Order did not authorize BCSD to dismiss the surcharge application.²⁴ The Trustee asserts that BCSD did not have the authority to dismiss the surcharge application in the absence of specific approval of the Franklin Circuit Court.²⁵ The Trustee asserts, in the alternative, that even if BCSD had the authority to dismiss the Surcharge application, dismissal of the surcharge case was contrary to BCSD's fiduciary duty as the receiver of Bullitt Utilities' assets.²⁶ The Trustee asserts that BCSD has "left Bullitt Utilities with absolutely no possibility of paying the extraordinary debts that were incurred due to the failure of its WWTP."²⁷ Per the Trustee:

The filing of the bankruptcy petition against Bullitt Utilities and the appointment of the undersigned as the Trustee of Bullitt Utilities' bankruptcy estate are matters that could not have been considered by the Commission in ruling on the BCSD's and the Attorney General's Motion to Dismiss the Surcharge Application.²⁸

On January 6, 2016, the Trustee also filed a Motion for Intervention. The Trustee states that he must protect the assets of Bullitt Utilities' bankruptcy estate.²⁹ The Trustee states that the requested surcharge is a significant potential asset of Bullitt

²⁴ *Id.* at 3.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 4.

²⁹ Trustee Motion to Intervene at 1.

Utilities.³⁰ The Trustee states that the Commission should grant the Motion to Intervene so that the Trustee can take the necessary steps to protect Bullitt Utilities' assets.³¹

The AG and BCSD, as Receiver, oppose the Trustee's motions. They argue, among other things, that: 1) the Motion to Intervene is untimely; 2) the Motion to Intervene fails to allege an interest in the matter that would provide a basis for intervention; 3) the Trustee is "an uninterested party," and permitting his intervention would cause undue complication and disruption; 4) the Trustee's request does not satisfy the requirements of KRS 278.400; and 5) a request for reconsideration may only be made by a party to the proceeding.³²

The Trustee, in reply to the AG and BCSD, as Receiver, states that the position of the AG and BCSD, as Receiver, are contrary to bankruptcy law and rules allowing intervention.³³ The Trustee, referencing CR 24.01 of the Kentucky Rules of Civil Procedure, argues that intervention is permitted.³⁴ He further states that the petition filed in the bankruptcy case operates as a stay applicable to all entities; the estate in bankruptcy includes all legal or equitable interest of the debtor in property as of the commencement of the bankruptcy case; and that the Trustee has "full authority and control over the surcharge claim pending before the Public Service Commission and

³⁰ *Id.* at 2.

³¹ *Id.* at 2.

³² AG and BCSD, as Receiver, Joint Response at 1–4.

³³ Reply of the Bankruptcy Trustee to Response of the Kentucky Attorney General to Trustee's Motion to Intervene ("Reply of Trustee to AG") at 1.

³⁴ *Id.*

any related claims' in the possess of Bullitt Utilities, Inc. in the Chapter 7 Involuntary Bankruptcy case.³⁵ The Trustee states:

The disposition of this action without the presence of the Trustee may as a practical matter impair or impeded the ability of the Trustee to perform his duties under bankruptcy law to protect the interests of the debtor estate. The Trustee is clearly a party in interest that should be allowed to intervene in this case as a matter of right.³⁶

ANALYSIS

Foremost, although Bullitt Utilities filed the surcharge application, Bullitt Utilities subsequently exercised a right under state law, KRS 278.021(2)(a) and (b), to abandon the assets that it used to furnish utility service to the customers of the Hunters Hollow collection system. As explained in our August 31, 2015 Order in the abandonment proceeding, once Bullitt Utilities carried its burden and met the requirements of KRS 278.021(2)(a) and (b), the Commission was required to make a finding of abandonment.³⁷ As we noted in our October 16, 2015 Order:

Bullitt Utilities, having abandoned the Hunters Hollow collection system, no longer has any right to exercise powers regarding the preservation, operation, control, management, maintenance, or care of the assets and operations it has abandoned; therefore, Bullitt Utilities no longer has the right to prosecute this action. The Commission finds that Bullitt Utilities is without authority to continue as the applicant in this proceeding; therefore, Bullitt Utilities should be dismissed as the applicant. We find that Bullitt Utilities should be dismissed as a party to this case.

³⁵ *Id.* at 2.

³⁶ *Id.* at 3.

³⁷ Case No. 2015-00290, *Bullitt Utilities, Inc.* (Ky. PSC Aug. 31, 2015), Order at 5.

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."³⁸

Bullitt Utilities has abandoned the assets, and it no longer has any interest in the surcharge proceeding. The Trustee appears to be asserting authority on behalf of Bullitt Utilities, but it is unclear from the record before us what rights, if any, Bullitt Utilities now has. After the Commission's finding that Bullitt Utilities had abandoned its assets, that abandonment was subsequently affirmed by the September 23, 2015 order of the Franklin Circuit Court. That order, entered pursuant to the statutory provisions set forth in KRS 278.021 and before the commencement of any bankruptcy proceedings, authorized BCSD to be the receiver of the assets of Bullitt Utilities, but did not authorize or designate BCSD to be the receiver for the liabilities of Bullitt Utilities. Thus, the Trustee's motions for rehearing raise serious legal issues as to whether Bullitt Utilities now has any property rights that can be asserted at the Commission by the Trustee, or whether the Franklin Circuit Court must first modify or amend its September 23, 2015 order to restore to Bullitt Utilities and/or the Trustee the right to exercise control of Bullitt Utilities' assets, at least to the extent of pursuing its now-dismissed application for a rate surcharge. Additionally, since the Franklin Circuit Court authorized BCSD to be the receiver for Bullitt Utilities, it is unclear whether the Commission can grant the Trustee any relief arising from his claim that BCSD violated its fiduciary duty by dismissing the

³⁸ Order (Ky. PSC Oct. 16, 2015) at 4-5.

rate surcharge before the Franklin Circuit Court makes a determination that BCSD did actually violate its fiduciary duty. While we acknowledge that a bankruptcy petition has been filed and that the Bankruptcy Court has appointed the Trustee, the Trustee's ability to intervene in this matter and seek rehearing appears to arise solely from the claim of rights possessed by Bullitt Utilities. For these reasons, the Commission finds it appropriate to grant a rehearing for the limited purpose of determining 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.

Accordingly, the Commission establishes a procedural schedule and directs the Trustee to file a brief that addresses the issues described above, as well as: 1) whether, under KRS 278.010(3)(f), Bullitt Utilities is now a utility whose rates and service are subject to Commission jurisdiction; 2) what rights and claims, if any, can now be asserted at the Commission by or on behalf of Bullitt Utilities consistent with the Orders of the Franklin Circuit Court and the Commission confirming Bullitt Utilities' voluntary abandonment of all utility assets and the designation of BCSD as receiver; 3) whether, and if applicable to what extent and how, the stay referenced in the Reply of the Trustee to AG operates to prevent the Commission from conducting proceedings; 4) whether the Commission, as plaintiff to the receivership action in the Franklin Circuit Court, has jurisdiction to grant the Trustee any relief;³⁹ and 5) whether the Trustee, by virtue of his

³⁹ *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); and Case No. 2015-00290, *Bullitt Utilities, Inc.* (Ky. PSC Aug. 24, 2015).

appointment by the Bankruptcy Court and the operation of the automatic stay, possesses rights greater than those abandoned and can thus pursue on behalf of the creditors.

Once we have received briefs and determined the legal issues presented, we will issue an Order setting forth our determination. If we determine that Bullitt Utilities has legal rights that can now be asserted by the Trustee, that the Trustee has the authority to seek intervention, and that intervention is warranted, we will then consider the merits of the Trustee's motion for rehearing of the December 15, 2015 Order dismissing the surcharge application.

IT IS THEREFORE ORDERED that:

1. The Trustee's Motion for Rehearing and Supplemental Motion for Rehearing are granted for the limited purposes of considering the legal issues as described in this Order.

2. A ruling on the merits of the Trustee's Motion for Intervention shall be deferred.

3. The Trustee shall file his brief addressing the issues identified in this Order on or before February 4, 2016.

4. BCSD, as receiver, and the AG may file a response brief to the Trustee on or before February 18, 2016.

5. Nothing contained herein shall prevent the Commission from entering further Orders in this matter.

By the Commission

ENTERED
JAN 21 2016
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:



Executive Director

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