

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF BULLITT ) CASE NO.  
UTILITIES, INC. FOR A SURCHARGE ) 2016-00401

ORDER

By an application submitted on November 30, 2016, Bullitt Utilities, Inc. (“Bullitt Utilities”), by Robert W. Keats, Chapter 7 Bankruptcy Trustee for Bullitt Utilities (“Trustee”), requested, among other things, authority to implement a surcharge to recover costs relating to the 2014 failure of the wastewater treatment plant (“WWTP”), then operated by Bullitt Utilities. The application of Bullitt Utilities was submitted by Special Counsel for Robert W. Keats, Chapter 7 Bankruptcy Trustee for Bullitt Utilities, Inc. (“Special Counsel”).<sup>1</sup> The Attorney General of the Commonwealth of Kentucky (“Attorney General”), the city of Hillview, Kentucky (“Hillview”), and the city of Hunters Hollow, Kentucky (“Hunters Hollow”), separately, sought and were granted intervention into the instant case.

On December 29, 2016, the Commission entered an Order that found “the Bankruptcy Court has authorized the Trustee to act for Bullitt Utilities in all legal proceedings including any potential surcharge claim before the Commission.”<sup>2</sup> The Order thereafter found that “while the control over the assets of Bullitt Utilities by the Trustee

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<sup>1</sup> Application (submitted Nov. 30, 2016) at 14, 15, and 19.

<sup>2</sup> Order (Ky. PSC Dec. 29, 2016) at 21.

has been comprehensively addressed by the Bankruptcy Court,” the legal status of the assets of Bullitt Utilities “pursuant to state law and for purposes of the Commission’s jurisdiction over rates and service should be briefed by the Trustee and the parties.”<sup>3</sup> Specifically, the Order found that the “Trustee should file a brief that supports his position that Bullitt Utilities has a right under state law to request the surcharge rate” and identified the issues that the brief was required to address.<sup>4</sup> The Order also authorized any party that had been granted intervention an opportunity to file a response brief to the brief submitted by the Trustee.<sup>5</sup> The Order, in pertinent part, determined that the application for a surcharge “shall not be considered filed,” until “the Commission has entered an Order accepting the Application for filing.”<sup>6</sup>

On January 13, 2017, the initial brief of the Trustee to the legal issues identified in the Commission’s December 29, 2016 Order (“Trustee’s Response”) was filed into the record. Bullitt Utilities argued that it, through the Trustee, had a right under state law to request the surcharge rate because it remains a regulated utility that acts through its receiver.<sup>7</sup> Bullitt Utilities relied upon the Commission’s April 11, 2016 orders in Case No. 2015-00100, *An Investigation of Cedar Hills Disposal Sanitation Corporation’s Notice of Intent to Abandon Service* (“Cedar Hills Abandonment”) and Case No. 2015-00101, *An Investigation of Friendly Park Development, Inc.’s Notice of Intent to Abandon Service*

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<sup>3</sup> *Id.* at 21 and 22.

<sup>4</sup> *Id.* at 22 and 23.

<sup>5</sup> *Id.* at 23.

<sup>6</sup> *Id.* at 23 and 24.

<sup>7</sup> Trustee’s Response (filed Jan. 13, 2017) at 1 and 2.

("Friendly Park Abandonment") in support of this position.<sup>8</sup> Bullitt Utilities argued that the Bankruptcy Court orders transferred control of the surcharge claim in Case No. 2014-00255 ("First Surcharge Case")<sup>9</sup> from Bullitt County Sanitation District ("BCSD"), as receiver, to the Trustee.<sup>10</sup> Per the Trustee, because BCSD could file revisions to the existing tariff, the Trustee may file a tariff on behalf of Bullitt Utilities.<sup>11</sup> Additionally, the Trustee indicates that any surcharge collected from the customers of the Hunters Hollow collection system would be subject to distribution under the jurisdiction of the Bankruptcy Code.<sup>12</sup> Finally, the Trustee argued that Bullitt Utilities is obligated to provide service to the customers of the Hunters Hollow system.<sup>13</sup>

On January 27, 2017, responses to the Trustee's initial brief were filed by the Attorney General ("Attorney General's Response") and Hillview ("Hillview's Response"). The Attorney General argued that the Trustee failed to offer any support for the assertion that state law allows Bullitt Utilities to request a surcharge after an abandonment has been granted.<sup>14</sup> The Attorney General stated that abandonment alters the status of the utility under state law.<sup>15</sup> Per the Attorney General, the Trustee, in effect, "is trying to

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<sup>8</sup> *Id.* at 2 and 3.

<sup>9</sup> Case No. 2014-00255, *Application of Bullitt Utilities, Inc. for a Certificate of Convenience and Necessity and Surcharge for Same* (submitted July 17, 2014); style of case revised to *Application of Bullitt County Sanitation District as Receiver for the Assets of Bullitt Utilities, Inc. for a Certificate of Convenience and Necessity and Surcharge for Same* (Ky. PSC Oct. 16, 2015) at 6.

<sup>10</sup> Trustee's Response at 3 and 4.

<sup>11</sup> *Id.* at 4.

<sup>12</sup> *Id.* at 4.

<sup>13</sup> *Id.* at 5.

<sup>14</sup> Attorney General's Response (filed Jan. 27, 2017) at 2.

<sup>15</sup> *Id.* at 4.

benefit from the abandonment by requesting a surcharge for the benefit of Bullitt Utilities' creditors without having to assume the responsibility for running a sewer utility."<sup>16</sup> The Attorney General stated that the Trustee does not possess any rights greater than those held by Bullitt Utilities at the commencement of the bankruptcy proceeding.<sup>17</sup> Per the Attorney General, Bullitt Utilities voluntarily ceded possession and control of its operations by requesting to abandon them and has no authority to file a tariff; therefore, the Trustee has no authority to file a tariff with the Commission.<sup>18</sup> The Attorney General stated that Bullitt Utilities has no obligation to continue to serve its former customers.<sup>19</sup> Finally, the Attorney General argued that Bullitt Utilities has no interest in the rates charged to and collected from the customers served by the Hunters Hollow System.<sup>20</sup>

Hillview did not "disagree that the PSC retains jurisdiction over BU [Bullitt Utilities] as a utility."<sup>21</sup> However, Hillview did object to the claim that Bullitt Utilities has the authority to apply for a surcharge.<sup>22</sup> Hillview argued that the Trustee had not requested the Franklin Circuit Court to withdraw its September 23, 2015 order appointing BCSD as receiver and had not sought an order of the Bankruptcy Court transferring possession and control over the assets from BCSD, as receiver, to the Trustee.<sup>23</sup>

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<sup>16</sup> *Id.* at 3.

<sup>17</sup> *Id.* at 5.

<sup>18</sup> *Id.* at 5 and 6.

<sup>19</sup> *Id.* at 6 to 9.

<sup>20</sup> *Id.* at 10.

<sup>21</sup> Hillview's Response (filed Jan. 27, 2017) at 2 (unnumbered).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 2 and 3 (unnumbered).

On February 1, 2017, Bullitt Utilities filed a motion for leave to file a reply to the response briefs of the Attorney General and Hillview. Bullitt Utilities tendered its reply in support of its initial brief with its motion (“Trustee’s Reply”). In his reply, the Trustee argued that the Attorney General and Hillview did not recognize the relationship of the Bankruptcy Court orders to the Franklin Circuit Court Order.<sup>24</sup> The Trustee stated that he controls “anything related to the Surcharge Application,” and that the ultimate distribution of the surcharge proceeds is subject to the jurisdiction of the Bankruptcy Court.<sup>25</sup> The Trustee stated that the Attorney General ignored the Commission’s April 11, 2016 Order in Case No. 2015-00100, and asserted that Bullitt Utilities “has the same rights now that it had before the Abandonment and Receivership Cases and the only difference is who can act for it.”<sup>26</sup> The Trustee stated that he can file a tariff relating to a surcharge because Bullitt Utilities remains a utility with an obligation to serve its customers.<sup>27</sup> On February 6, 2017, the Attorney General filed his objection to Bullitt Utilities’ motion to file a reply.

For the reasons stated below, the Commission grants the Trustee’s motion to file a reply brief. Further, upon a review of the record, the Commission finds that under state law Bullitt Utilities has no authority to file the proposed surcharge tariff. The Trustee’s application for a surcharge, therefore, must be rejected for filing. The Commission also finds that any right that Bullitt Utilities, or the Trustee on its behalf, had to maintain or file a tariff terminated on September 23, 2015.

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<sup>24</sup> Trustee’s Reply (tendered Feb. 1, 2017) at 1.

<sup>25</sup> *Id.* at 2 to 4.

<sup>26</sup> *Id.* at 4.

<sup>27</sup> *Id.* at 4 and 5.

## DISCUSSION

On March 29, 2014, the steel aeration tank at Bullitt Utilities' Hunters Hollow WWTP experienced a catastrophic failure. The instant case is the fourth proceeding that is a product of the event. In Case No. 2014-00163 ("Investigation Case"), consequent to the failure, the Commission opened an investigation into the issues surrounding Bullitt Utilities' provision of wastewater treatment service.<sup>28</sup> In the First Surcharge Case, Bullitt Utilities applied for a Certificate of Public Convenience and Necessity ("CPCN") and surcharge ("First Surcharge Application").<sup>29</sup> In Case No. 2015-00290 ("Abandonment Case"), while the investigation and review of the First Surcharge Case was pending, the Commission opened an investigation into Bullitt Utilities' request to abandon its property.<sup>30</sup> The instant case is the second request for a surcharge.

On August 31, 2015, the Commission entered an Order in the Abandonment Case that authorized Bullitt Utilities to abandon all property interests or all rights to utility property, real or personal, necessary to provide service by Bullitt Utilities.<sup>31</sup> The August 31, 2015 Order in the Abandonment Case required Bullitt Utilities to continue to operate the Hunters Hollow collection system and related facility until the Franklin Circuit Court entered an order attaching the assets of Bullitt Utilities and placing those assets under

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<sup>28</sup> Case No. 2014-00163, *An Investigation of Existing and Future Service of Bullitt Utilities, Inc.* (Ky. PSC May 22, 2014) at 3.

<sup>29</sup> Case No. 2014-00255, (Ky. PSC Oct. 16, 2015) at 6.

<sup>30</sup> Case No. 2015-00290, *Bullitt Utilities, Inc.'s Notice of Surrender and Abandonment of Utility Property* (Ky. PSC Aug. 24, 2015) at 4.

<sup>31</sup> Case No. 2015-00290 (Ky. PSC Aug. 31, 2015) at 7.

the sole control and responsibility of a receiver, or September 30, 2015, whichever occurred earlier.<sup>32</sup>

The Commission thereafter brought an action in the Franklin Circuit Court seeking the attachment of the assets of Bullitt Utilities and the appointment of a receiver for those assets (“Circuit Court Receivership Case”).<sup>33</sup> Although there was a catastrophic failure of Bullitt Utilities’ WWTP, it also operated a wastewater collection system. Following the Franklin Circuit Court’s order entered on September 23, 2015, attaching the assets of Bullitt Utilities and appointing BCSD as receiver for these assets, the Commission found that Bullitt Utilities no longer had the right to prosecute the First Surcharge Case.<sup>34</sup> The Commission dismissed Bullitt Utilities as the applicant in the First Surcharge Case, removed Bullitt Utilities as a party from that proceeding, and substituted BCSD, as receiver, as the applicant in that proceeding.<sup>35</sup> Pursuant to the Commission’s August 31, 2015 Order in the Abandonment Case, Bullitt Utilities’ obligation and authority to operate the Hunters Hollow collection system terminated on September 23, 2015.

Bullitt Utilities did not apply for rehearing or bring an action for judicial review of the Commission’s October 16, 2015 Order in the Abandonment Case, and did not apply for rehearing or bring an action for judicial review of the Commission’s October 16, 2015 Order that removed Bullitt Utilities as a party in the First Surcharge Case.

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<sup>32</sup> *Id.*

<sup>33</sup> *Public Service Commission v. Bullitt Utilities, et al.*, Civil Action No. 15-CI-00946 (Franklin Circuit Court, Division II, filed Sept. 2, 2015).

<sup>34</sup> Case No. 2015-00290 (Ky. PSC Oct. 16, 2015) at 4.

<sup>35</sup> *Id.* at 6.

Upon the joint motion of BCSD and the Attorney General to dismiss, without prejudice, the application in the First Surcharge Case, the Commission entered an Order on December 15, 2015, that found BCSD, as receiver, had been vested with “the power to manage the assets of Bullitt Utilities in providing sewage collection and treatment service to the public.”<sup>36</sup> The Order further stated: “Bullitt Utilities has abandoned the assets of its Hunters Hollow system, has been dismissed as a party to this proceeding, and has no interest in this proceeding.”<sup>37</sup> The Commission granted the joint motion, and the First Surcharge Case was dismissed without prejudice and removed from the Commission’s docket.<sup>38</sup>

Following their dismissal of the First Surcharge Case, Veolia Water Technologies, Inc. (“Veolia”) and Perdue Environmental Contracting Company, Inc. (“PECCo”) filed an involuntary Chapter 7 Bankruptcy petition with the United States Bankruptcy Court for the Western District of Kentucky (“Bankruptcy Court”).<sup>39</sup> The Bankruptcy Court appointed the Trustee on December 29, 2015, and the Trustee thereafter sought intervention into the First Surcharge Case and rehearing of the December 15, 2015 Order dismissing, without prejudice, the First Surcharge Application.<sup>40</sup>

In view of the complexities resulting from the orders in the Abandonment Case, the First Surcharge Case, and the appointment of a Trustee by the Bankruptcy Court, the

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<sup>36</sup> Case No. 2014-00255, (Ky. PSC Dec. 15, 2015) at 4.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Case No. 2014-00255 (Ky. PSC Jan. 21, 2016) at 7.

<sup>40</sup> *Id.*



Commission noted, in pertinent part and in response to the Trustee's request for rehearing:

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.<sup>41</sup>

The Commission ordered a briefing schedule on the legal issues presented by the abandonment, dismissal of the First Surcharge Case, and the Bankruptcy Trustee's request for rehearing.<sup>42</sup> Following a careful review of the pleadings filed by the Trustee and the parties to the First Surcharge Case, as well as the pertinent statutes and case law, the Commission found that the Trustee did not possess "any rights greater than those rights held by Bullitt Utilities at the time of commencement of the bankruptcy proceeding."<sup>43</sup> The Commission determined that because Bullitt Utilities would not be entitled to intervention into the First Surcharge Case or a rehearing of the December 15, 2015 Order due to the finality of its voluntary abandonment of utility operations, the Trustee's motions for intervention and rehearing should be denied.<sup>44</sup>

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<sup>41</sup> *Id.* at 12.

<sup>42</sup> *Id.* at 11 through 13.

<sup>43</sup> Case No. 2014-00255 (Ky. PSC Apr. 14, 2016) at 6 and 7.

<sup>44</sup> *Id.* at 7 through 12.

In discussing the issues, the Commission stated:

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.<sup>45</sup>

Bullitt Utilities' Motion to File a Reply Brief

The records associated with the catastrophic failure, abandonment, and bankruptcy are extensive. Additionally, the legal issues associated with the pending application are complex and impacted by separate, ongoing legal proceedings in the Franklin Circuit Court and the Bankruptcy Court. Earlier in this proceeding, the Commission identified the need for briefing on the issues of Bullitt Utilities' status as a utility, its legal authority to file a tariff, and its interest in the rates collected from, and the obligations with respect to, the customers of the Hunters Hollow collection system under state law.<sup>46</sup> The Commission established a procedural schedule that ordered the Trustee to brief these issues and permitted any party that had been granted intervention to file a response brief.<sup>47</sup>

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<sup>45</sup> *Id.* at 10.

<sup>46</sup> Order (Ky. PSC Dec. 29, 2016) at 22.

<sup>47</sup> *Id.* at 23.

The Trustee's initial brief, on behalf of Bullitt Utilities, was filed on January 13, 2017. Thereafter, response briefs were filed by both the Attorney General and Hillview on January 27, 2017. On February 1, 2017, Bullitt Utilities filed a motion for leave to file a reply to the briefs of the Attorney General and Hillview, and with its motion filed its reply. On February 6, 2017, the Attorney General filed his objection to Bullitt Utilities' motion to file a reply.

The Commission has examined the motion to file a reply, the reply, and the Attorney General's objection. The Commission finds that Bullitt Utilities' reply responds to matters discussed by the Attorney General and Hillview. The Attorney General alleges prejudice in allowing Bullitt Utilities to "have the last word in this matter."<sup>48</sup> However, Bullitt Utilities, as the applicant, has the burden to demonstrate its legal authority to file the tariff as well as the lawfulness of the surcharge request. There is no substantial prejudice to the Attorney General in permitting Bullitt Utilities an opportunity to reply.<sup>49</sup>

The Commission finds that in view of the idiosyncratic legal and factual issues presented by this application, limiting or restricting Bullitt Utilities' opportunity to present its positions in the manner suggested by the Attorney General is unwarranted. Permitting Bullitt Utilities to file a reply provides it with a full and fair opportunity to present arguments concerning these complex issues; accordingly, the Commission finds that the Bullitt Utilities' reply should be accepted.

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<sup>48</sup> Objection (filed Feb. 6, 2017) at 2 (unnumbered).

<sup>49</sup> See, for comparison, 807 KAR 5:001, Section 5(3).

### Bullitt Utilities' Application for a Surcharge

The instant case involves the combination of two infrequent events, the voluntary abandonment of a utility, and a utility in bankruptcy. The Commission finds it appropriate to discuss the legislative history of the abandonment provisions in KRS Chapter 278, the General Assembly's establishment of a voluntary abandonment provision, and prior orders of the Commission concerning bankruptcy.

### Legislative History of Abandonment Provisions

Pursuant to KRS 278.030(2), each utility is required to "furnish adequate, efficient, and reasonable service." Additionally, in pertinent part, KRS 278.020(6) provides that no person shall abandon the ownership of, or control, or the right to control any utility under the jurisdiction of the Commission without prior approval by the Commission.<sup>50</sup> Thus, the preservation of the continuity of reasonable utility service is a manifest purpose of the Commission.

Prior to 1994, there was no provision in KRS Chapter 278 authorizing the Commission to pursue a receivership for the assets of an abandoned utility. In 1994, the General Assembly enacted KRS 278.021 and provided statutory authority for the Commission to petition the Franklin Circuit Court for an order attaching the assets of an abandoned utility and the appointment of a receiver for the assets of an abandoned utility.<sup>51</sup> The initial version of KRS 278.021 provided the following:

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<sup>50</sup> See also *Public Service Commission v. Cities of Southgate, Highland Heights*, 268 S.W.2d 19, 21 (Ky. 1954) ("utility subject to jurisdiction of Public Service Commission cannot discontinue operations without approval of the commission").

<sup>51</sup> 1994 Ky. Acts Ch. 145, § 1 (effective July 15, 1994).

- (1) If the commission determines, after notice and hearing, that any utility is abandoned, the commission may petition the Franklin Circuit Court for an order attaching the assets of the utility and placing it under the sole control and responsibility of a receiver.
- (2) Any receiver appointed by the court shall file a bond unless the court finds it unnecessary. The receiver shall operate the utility to preserve its assets and to serve the best interests of its customers.<sup>52</sup>

The foremost objective in construing a statute is determining the legislature's intent in enacting the legislation.<sup>53</sup> The Commission finds that the plain and ordinary meaning of KRS 278.021, as enacted in 1994, was to provide the Commission with an opportunity to prevent termination of utility service by placing the assets of an abandoned utility under the control of a receiver to ensure continuity of utility service, to continue operating the assets, and preserve them in the best interests of the utility's customers. There was no intent to provide the Commission with authority to seek the dissolution of a corporation or to seek a receivership or custodianship for protecting the best interests of shareholders or creditors.

While the initial version of KRS 278.021 required a receiver to preserve the assets of the utility, the preservation of the assets was in furtherance of the continuity of service and the best interests of the customers. An examination of the pertinent sections of KRS Chapter 271B concerning dissolution and receivership or custodianship of a corporation that were in effect at the time that KRS 278.021 was added to KRS Chapter 278 confirms this point.

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<sup>52</sup> *Id.*

<sup>53</sup> *Pearce v. University of Louisville, by and Through Its Board of Trustees*, 448 S.W.3d 746, 749 (Ky. 2014).

At the time of the 1994 enactment of KRS 278.021, the following statutory provisions concerning judicial dissolution and receivership or custodianship were in effect as part of KRS Chapter 271B, the Kentucky Business Corporation Act, the Chapter in the KRS under which Bullitt Utilities was incorporated. KRS 271B.14-300 stated:

The Circuit Court may dissolve a corporation:

(1) In a proceeding by the Attorney General if it is established that:

- (a) The corporation obtained its articles of incorporation through fraud; or
- (b) The corporation has continued to exceed or abuse the authority conferred upon it by law;

(2) In a proceeding by a shareholder if it is established that:

- (a) The directors are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock, and irreparable injury to the corporation is threatened or being suffered, or the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally, because of the deadlock;
- (b) The directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal or fraudulent; or
- (c) The shareholders are deadlocked in voting power and have failed, for a period that includes at least two (2) consecutive annual meeting dates, to elect successors to directors whose terms have expired;

(3) In a proceeding by a creditor if it is established that:

- (a) The creditor's claim has been reduced to judgment, the execution on the judgment returned unsatisfied, and the corporation is insolvent; or

- (b) The corporation has admitted in writing that the creditor's claim is due and owing and the corporation is insolvent; or
- (4) In a proceeding by the corporation to have its voluntary dissolution continued under court supervision.

KRS 271B.14-320 stated:

- (1) A court in a judicial proceeding brought to dissolve a corporation may appoint one (1) or more receivers to wind up and liquidate, or one (1) or more custodians to manage, the business and affairs of the corporation. The court shall hold a hearing, after notifying all parties to the proceeding and any interested persons designated by the court, before appointing a receiver or custodian. The court appointing a receiver or custodian shall have exclusive jurisdiction over the corporation and all of its property wherever located.
- (2) The court may appoint an individual or a domestic or foreign corporation (authorized to transact business in this state) as a receiver or custodian. The court may require the receiver or custodian to post bond, with or without sureties, in an amount the court directs.
- (3) The court shall describe the powers and duties of the receiver or custodian in its appointing order, which may be amended from time to time. Among other powers:
  - (a) The receiver:
    - 1. May dispose of all or any part of the assets of the corporation wherever located, at a public or private sale, if authorized by the court; and
    - 2. May sue and defend in his own name as receiver of the corporation in all courts of this state; and
  - (b) The custodian may exercise all of the powers of the corporation, through or in place of its board of directors or officers, to the extent necessary to manage the affairs of the corporation in the best interests of its shareholders and creditors.

- (4) The court during a receivership may redesignate the receiver a custodian, and during a custodianship may redesignate the custodian a receiver, if doing so is in the best interests of the corporation, its shareholders, and creditors.
- (5) The court from time to time during the receivership or custodianship may order compensation paid and expense disbursements or reimbursements made to the receiver or custodian and his counsel from the assets of the corporation or proceeds from the sale of assets.

Thus, at the time of the enactment of KRS 278.021, the General Assembly clearly provided creditors, among others, with the right to seek the dissolution of an insolvent corporation and the appointment of a receiver or custodian through KRS Chapter 271B. The receiver or custodian appointed through KRS Chapter 271B is required to consider the best interests of a corporation's shareholders and creditors. Thus, the General Assembly clearly chose to limit the authority to seek a receiver under KRS 278.021 to the Commission alone and to assign a role to the receiver in possession of, and operating the assets of, a public utility pursuant to KRS 278.021 different from the role of the receiver or custodian appointed under the provisions of KRS Chapter 271B.<sup>54</sup> There is no suggestion in either chapter of the statutes that the Commission's pursuit of a receivership pursuant to KRS 278.021 prevented a shareholder or creditor from pursuing a receivership or custodianship pursuant to KRS Chapter 271B or vice versa.

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<sup>54</sup> See, for comparison, *St. Clair v. Commonwealth*, 140 S.W.3d 510, 570 (Ky. 2004) (The legislature is presumed to be aware of existing laws when enacting a new statute.)



### Creation of Voluntary Abandonment Provision in 2011

KRS 278.021 was significantly expanded by the General Assembly in 2011. The revised version of KRS 278.021 in effect at the time of Bullitt Utilities' application for an abandonment in Case No. 2015-00290 provided the following:

- (1) If the commission, after notice and hearing, enters an order in which it finds that a utility is abandoned, the commission may bring an action in the Franklin Circuit Court for an order attaching the assets of the utility and placing those assets under the sole control and responsibility of a receiver.
- (2) For purposes of this section, a utility shall be considered abandoned if it:
  - (a) Disclaims, renounces, relinquishes, or surrenders all property interests or all rights to utility property, real or personal, necessary to provide service;
  - (b) Notifies the commission of its intent to abandon the operation of the facilities used to provide service;
  - (c) Fails to comply with an order of the commission in which the commission determined that the utility is not rendering adequate service, specified the actions necessary for the utility to render adequate service, and fixed a reasonable time for the utility to perform such actions, and the failure of the utility to comply with the order presents a serious and imminent threat to the health or safety of a significant portion of its customers; or
  - (d) Fails to meet its financial obligations to its suppliers and is unable or unwilling to take necessary actions to correct the failure after receiving reasonable notice from the commission, and the failure poses an imminent threat to the continued availability of gas, water, electric, or sewer utility service to its customers.
- (3) Within twenty (20) days after commencing an action in the Franklin Circuit Court, the commission shall file a certified copy of the record of the administrative proceeding in which the commission entered its finding of abandonment.

- (4) Any action brought pursuant to KRS 278.410 for review of an order of the commission containing a finding that a utility is abandoned shall be consolidated with any action brought pursuant to subsection (1) of this section and based upon the same order.
- (5) Any receiver appointed by the court shall file a bond in the amount fixed by the court. The receiver shall operate the utility to preserve its assets, to restore or maintain a reasonable level of service, and to serve the best interests of its customers.
- (6) During the pendency of any receivership, the receiver may bring or defend any cause of action on behalf of the utility and generally perform acts on behalf of the utility as the court may authorize.
- (7) The receiver shall control and manage the assets and operations of the utility until the Franklin Circuit Court, after reasonable notice and hearing, orders the receiver to return control of those assets to the utility or to liquidate those assets as provided by law.
- (8)
  - (a) Notwithstanding subsection (1) of this section, the commission may petition the Franklin Circuit Court to appoint temporarily a receiver to operate and manage the assets of an abandoned utility. After notice to the utility and a hearing, the court may grant a petition upon terms and conditions it deems appropriate, upon a showing by a preponderance of the evidence:
    1. That a utility has been abandoned;
    2. That the abandonment is an immediate threat to the public health, safety, or the continued availability of service to the utility's customers; and
    3. That the delay required for the commission to conduct a hearing would place the public health, safety, or continued utility service at unnecessary risk.
  - (b) Sixty (60) days after its entry, the order of temporary receivership shall terminate and control and responsibility for the assets and operations of the utility

shall revert to the utility without further action of the court unless the commission brings an action under subsection (1) of this section.

Pertinent to the discussion of KRS 278.021 in the instant case is the addition of provisions in 2011 establishing the criteria that the Commission is required to apply in order to determine whether a utility is abandoned. As explained in the August 31, 2015 Order in the Abandonment Case, “[i]f the Commission finds that one or more of the four criteria identified in KRS 278.021(2) is met, then the Commission has no discretion and is required, pursuant to the term ‘shall’ in the statute, to consider the utility abandoned.”<sup>55</sup>

Hence, as a result of the 2011 amendments, KRS 278.021(2)(a) now provides a utility with the authority to disclaim, renounce, relinquish, or surrender all property interests or all rights to utility property, real or personal, necessary to provide service. The Commission finds that the plain and ordinary meaning of the language of the version of KRS 278.021(2)(a) in effect at the time of Bullitt Utilities’ abandonment manifests an intent to authorize a utility to terminate unconditionally all interests in the assets necessary to provide utility service.<sup>56</sup>

The Commission finds that KRS 278.021(2)(a) does not require a transfer of legal title of the assets used to provide utility service as a prerequisite or condition that must be satisfied prior to disclaiming, renouncing, relinquishing, or surrendering the interests. The transfer of legal title of the assets is not necessary for the Commission to seek an order of the Franklin Circuit Court attaching the utility’s assets and placing them under

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<sup>55</sup> Case No. 2015-00290 (Ky. PSC Aug. 31, 2015) at 4.

<sup>56</sup> KRS 278.020 and KRS 278.021 were amended in 2016 and, per 278.020(12), the Commission may now, as a result of the 2016 amendments, impose terms and conditions as the Commission deems necessary or appropriate in granting an application for an abandonment of a sewer utility.

the control of a receiver appointed through KRS 278.021(1) upon a finding that KRS 278.021(2)(a) has been met. Indeed, as per the August 31, 2015 Order in the Abandonment Case, Bullitt Utilities' authority and obligation to provide utility service would have terminated on September 30, 2015 even if the Franklin Circuit Court had taken no action regarding the appointment of a receiver to take control over the assets. Legal title to the assets in a situation in which a utility affirmatively abandoned its interests in those assets pursuant to the version of KRS 278.021(2)(a) in effect at the time of Bullitt Utilities' bankruptcy was not relevant to a finding of abandonment by the Commission or to the Commission's authority to terminate Bullitt Utilities' service obligation.

The Commission has reviewed its orders from the Cedar Hills Abandonment, Case No. 2015-00100, and the Friendly Park Abandonment, Case No. 2015-00101, as well as the orders from the subsequent related litigation in the Franklin Circuit Court. The Commission finds that the Trustee's argument in the instant case results from a reading of the Commission's April 11, 2015 Order in the Cedar Hills Abandonment case that is too broad. Among the issues in the Cedar Hills Abandonment was whether the Commission or the Daviess County Regional Water Resource Agency ("RWRA") would have jurisdiction over rates for wastewater service during a receivership.<sup>57</sup>

The Daviess County Fiscal Court ("Daviess County") sought and was granted intervention into both the Cedar Hills Abandonment and Friendly Park Abandonment cases while they were pending at the Commission.<sup>58</sup> Daviess County argued that the RWRA, a joint sewer agency established pursuant to KRS 76.231 and exempt from the

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<sup>57</sup> Case No. 2015-00100 (Ky. PSC Apr. 22, 2015) at 7 and 8.

<sup>58</sup> *Id.* at 2; and see also Case No. 2015-00101 (Ky. PSC Apr. 22, 2014) at 2.

Commission's jurisdiction, would set rates for the provision of sewer service during the receivership.<sup>59</sup> The Commission's April 11, 2016 Order found that RWRA's exemption from the Commission's jurisdiction to set rates did not extend to exempt RWRA during a receivership.<sup>60</sup> The portions of the April 11, 2016 Order in the Cedar Hills Abandonment case relied upon by the Trustee in the instant case convey that the Commission found that RWRA's exemption did not extend to assets in receivership and that the Commission retained jurisdiction over the rates while the assets were in receivership. The April 11, 2016 Order in the Cedar Hills Abandonment did not address the issue in the instant case.

Moreover, following the Commission's final orders in the Cedar Hills Abandonment and Friendly Park Abandonment cases, Daviess County brought an action in the Franklin Circuit Court, pursuant to KRS 278.410, for judicial review of the Commission's orders granting abandonment in those cases.<sup>61</sup> On December 5, 2016, an order was entered by the Franklin Circuit Court that attached the assets of Cedar Hills Disposal Corporation and Friendly Park Disposal Sanitation Corporation and, further, appointed the RWRA as receiver.<sup>62</sup> Per the December 5, 2016 order, the parties in the Franklin Circuit Court proceeding agreed that "RWRA shall regulate the rates and services of Cedar Hills and Friendly Park during the receivership," which rendered moot the objection of RWRA and Daviess County to the Commission's assertion of jurisdiction over RWRA as receiver of

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<sup>59</sup> *Id.* at 7.

<sup>60</sup> *Id.* at 7 and 8.

<sup>61</sup> Daviess County Fiscal Court v. Kentucky Public Service Commission, et al., Civil Action No. 16-CI-00488, (Franklin Circuit Court, Division II) Complaint for Relief Pursuant to KRS 278.410 (filed May 4, 2016).

<sup>62</sup> Daviess County Fiscal Court v. Kentucky Public Service Commission, et al., Civil Action No. 16-CI-00488, Order (Franklin Circuit Court, Division II, Dec. 5, 2016).

Cedar Hills and Friendly Park.<sup>63</sup> As a result of the agreement, the Franklin Circuit Court did not rule on the issue of the Commission's jurisdiction over rates or service associated with wastewater service provided by abandoned assets during the pendency of a receivership.<sup>64</sup>

The Commission finds that the Cedar Hills Abandonment and the Friendly Park Abandonment proceedings, which included a challenge in the Franklin Circuit Court to the Commission's jurisdiction with regard to abandonment and receiverships, do not provide meaningful, much less conclusive, guidance on the issues in the instant case. The Commission has fully considered the controlling statutes and its orders and finds that the October 16, 2015 Order dismissing Bullitt Utilities as the applicant in the First Surcharge Case and removing Bullitt Utilities as a party correctly determined the status of Bullitt Utilities with regard to the First Surcharge Case.

Commission Precedent Concerning Bankruptcy

The Commission finds that its orders concerning three somewhat similar situations provide guidance for the instant case. In Case No. 9897, the Commission authorized a surcharge for the Mike Little Gas Company, Inc. ("Mike Little Gas") for a loan associated with past due payments owed to Kentucky-West Virginia Gas Company ("Kentucky-West").<sup>65</sup> Prior to Mike Little Gas' application with the Commission, Kentucky-West had filed an action in the Floyd Circuit Court in 1986, to collect the past-due charges and

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<sup>63</sup> *Id.* at 3 and 4 (unnumbered).

<sup>64</sup> *Id.*

<sup>65</sup> Case No. 9897, *An Adjustment of Imposition of Surcharge by the Mike Little Gas Company, Inc.* (Ky. PSC Oct. 1, 1987) at 1 and 8.

obtained an agreed judgment in the judicial action.<sup>66</sup> In reaching its decision to authorize a surcharge in Case No. 9897, the Commission noted that Mike Little Gas stated that it was considering both Chapter 11 Bankruptcy proceedings and “simply quitting the business,” while Kentucky-West stated that it would place the system into receivership in the event of a default.<sup>67</sup> The Commission granted Mike Little Gas the full amount of the surcharge sought. In permitting the full amount of the surcharge, the Commission stated:

Our choice must be based on what we consider to be the best alternative to ensure safe, continued and reliable gas service to the consumer of Mike Little Gas system at fair, just and reasonable rates.<sup>68</sup>

In reaching this decision, the Commission also found, among other things, that “[w]hether an, as yet, unknown receiver could or would operate the system safely and reliably is speculative.”<sup>69</sup> Thus, while Kentucky-West pursued and obtained a remedy in state court regarding the debt owed by Mike Little Gas, the Commission’s decision to authorize a surcharge was based on ensuring safe, continuous, and reliable utility service at fair, just and reasonable rates.

In Case No. 8235, Johnson County Gas Company, Inc. (“Johnson County”) filed an application with the Commission seeking approval of an increase in rates charged for natural gas service.<sup>70</sup> Johnson County owed both Columbia Gas of Kentucky (“Columbia

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<sup>66</sup> *Id.* at 1.

<sup>67</sup> *Id.* See, for background, *Union Carbide Corporation v. Kentuckiana Sales Co., Inc., et al.*, 423 S.W.2d 243, 245 (Ky. 1968) (receiver appointed by state court for benefit of all creditors).

<sup>68</sup> *Id.* at 4.

<sup>69</sup> *Id.* at 4

<sup>70</sup> Case No. 8235, *Johnson County Gas Co., Inc., Van Lear Kentucky 41265 Application for Authority to Adjust Rates on an Emergency Basis* (Ky. PSC Oct. 29, 1981) at 1.

Gas”) and Kentucky-West past-due amounts for gas, and Columbia Gas and Kentucky-West both requested “a surcharge on Johnson County’s ratepayers to be applied exclusively to the past due accounts” of the gas suppliers.<sup>71</sup> The Commission denied the surcharge request by an Order entered on October 29, 1981.<sup>72</sup>

Columbia Gas and Kentucky-West continued to experience billing problems with Johnson County and again requested implementation of a surcharge. After reviewing the facts, the Commission again denied the request for approval of a surcharge and stated:

[T]he Commission believes that the best course for Columbia and Kentucky-West Virginia is to seek appropriate creditors’ remedies in federal court.<sup>73</sup>

Eventually, Johnson County was the subject of an involuntary Chapter 11 bankruptcy proceeding in the Bankruptcy Court for the Eastern District of Kentucky.<sup>74</sup> As part of the bankruptcy proceedings, a change in ownership was ordered by the United States Bankruptcy Court through which the Kentucky Business Trust of Johnson County (“Kentucky Business Trust”) became the owner of Johnson County.<sup>75</sup>

In Case No. 10415, a subsequent investigation of the rates of Johnson County, a settlement agreement was filed into the record by the parties to the proceeding, including the members of the Kentucky Business Trust, namely the Commonwealth of Kentucky,

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 10 and 12.

<sup>73</sup> *Id.*

<sup>74</sup> Case No. 8966, Order (Ky. PSC Sept. 11, 1984) at 5 referencing *In Re Johnson County Gas Company*, Case No. 83-00002 (Eastern District of Kentucky); *see also* Case No. 10415, *An Investigation of the Rates of Johnson County Gas Company, Inc.*, Order (Nov. 9, 1988) and Staff Report [attached] Appendix A at 1.

<sup>75</sup> Case No. 8235, Order (Ky. PSC Nov. 9, 1988) at 1.



Department of Local Government (“DLG”) and Columbia Gas.<sup>76</sup> All the parties agreed under the settlement that rates should be redesigned to implement a surcharge specifically designated for the repayment of Johnson County’s debts to DLG and Columbia Gas.<sup>77</sup> The Commission found the settlement agreement in Case No. 10415 reasonable and authorized the surcharge.<sup>78</sup> Notably though, per the settlement agreement, the surcharge authorized in Case No. 10415 would immediately cease upon the extinguishment of the entire debt amount owed to DLG and Columbia Gas or “if any of the proceeds therefrom are used for any reason other than for repayment of the debts to DLG and to Columbia” Gas.<sup>79</sup> A second surcharge concerning the obligation of Johnson County to Kentucky-West was authorized in Case No. 10415-B.<sup>80</sup>

The orders concerning the former B.T.U. Gas Company (“BTU”) also provide guidance in the present case. BTU was the subject of a Chapter 7 Bankruptcy proceeding, and a bankruptcy trustee took possession of the assets formerly owned by BTU.<sup>81</sup> The bankruptcy trustee conducted a sale, and Kentucky Frontier Gas, LLC (“Frontier”) was the successful bidder for the former assets of BTU. At the time of the sale, Frontier had been operating the BTU system subsequent to an appointment by the

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<sup>76</sup> Case No. 10415, Order (Oct. 30, 1991) at 1 and 2.

<sup>77</sup> *Id.* at 2.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at Settlement Agreement A at 2.

<sup>80</sup> Case No. 10415-B, *The Notice of Purchased Gas Adjustment Filing of Johnson County Gas Company, Inc.*, Order (Mar. 1, 1991) at Appendix.

<sup>81</sup> Case No. 2012-00099, *Application of Kentucky Frontier Gas, LLC for Approval of Transfer of Assets of Former B.T.U. Gas Company and Approval of Financing of Acquisition*, Order (Ky. PSC June 1, 2012) at 3.

bankruptcy trustee.<sup>82</sup> Frontier applied for and received Commission approval of the acquisition of the assets formerly owned by BTU and its plan of financing of the acquisition in Case No. 2012-00099.<sup>83</sup>

The Commission finds that it has recognized that creditors may pursue bankruptcy proceedings as a means to protect their interests, and the initiation of bankruptcy proceedings by creditors is a matter outside of the Commission's purview. A bankruptcy trustee is not required to obtain Commission approval before taking possession of the assets of a utility in bankruptcy. A bankruptcy trustee may appoint an operator of a utility system during the pendency of the bankruptcy proceeding.

Further, the Commission has recognized that creditors may also pursue other means outside of KRS Chapter 278 to protect their interests, including the appointment of a receiver or custodian by a state court and the filing of an involuntary petition with the Bankruptcy Court. The Commission finds that the version of KRS 278.021 in effect at the time of Bullitt Utilities' abandonment did not authorize the Commission to consider the potential assertion of such creditor's rights prior to making a finding of abandonment under KRS 278.021(2)(a).

Bullitt Utilities Has No Authority to File the Proposed Tariff.

KRS 278.010(3) provides the following definition of a "utility."

"Utility" means any person except a regional wastewater commission established pursuant to KRS 65.8905 and, for purposes of paragraphs (a), (b), (c), (d), and (f) of this subsection, a city, who owns, controls, operates, or manages any facility used or to be used for or in connection with:

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<sup>82</sup> *Id.* at 4.

<sup>83</sup> *Id.* at 5.

...

(f) The collection, transmission, or treatment of sewage for the public, for compensation, if the facility is a subdivision collection, transmission, or treatment facility plant that is affixed to real property and is located in a county containing a city of the first class or is a sewage collection, transmission, or treatment facility that is affixed to real property, that is located in any other county, and that is not subject to regulation by a metropolitan sewer district or any sanitation district created pursuant to KRS Chapter 220.

“Person,” per KRS 278.010(2), “includes natural persons, partnerships, corporations, and two (2) or more persons having a joint or common interests.” “Corporation,” per KRS 278.010(1), “includes private, quasipublic, and public corporations, and all boards, agencies, and instrumentalities thereof, associations, joint-stock companies, and business trusts.”

As a creature of statute, the Commission “has only such powers as have been granted to it by the General Assembly.”<sup>84</sup> Thus, per KRS 278.040(1), the Commission regulates utilities and enforces the provisions of KRS Chapter 278. Pursuant to KRS 278.040(2), the Commission’s jurisdiction extends to all utilities in Kentucky, and the Commission has exclusive jurisdiction over the regulation of rates and service of utilities.

The Commission’s jurisdiction extends to the issue of who may provide service and who may abandon or cease providing service. Pursuant to KRS 278.020(1), a “person” must obtain prior approval of the Commission before providing utility service and engaging in any of the activities set forth by KRS 278.010(3). Pursuant to KRS 278.020(6), a “person” providing utility service must obtain the prior approval of the Commission before abandoning or ceasing the provision of service. Bullitt Utilities is a

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<sup>84</sup> *Boone County Water and Sewer District v. Public Service Commission*, 949 S.W.2d 588, 591 (Ky. 1997).

Kentucky for-profit corporation which was incorporated in 1976.<sup>85</sup> Bullitt Utilities' corporate existence is a matter subject to the provisions of KRS Chapter 271B, the Kentucky Business Corporation Act, a chapter of Kentucky's statutes that the Commission does not enforce. While the Commission determines whether Bullitt Utilities may provide, abandon, or cease providing utility service, the Commission does not determine whether Bullitt Utilities may incorporate, continue in existence as a corporate entity, or any other matters governed by KRS Chapter 271B. The Commission cannot enlarge its jurisdiction to determine issues that have not been assigned to it.<sup>86</sup>

Thus, at the time of the filing of the First Surcharge Case, Bullitt Utilities was a Kentucky corporation whose corporate existence and corporate affairs were determined by KRS Chapter 271B and a "utility" whose rates and service were subject to our jurisdiction pursuant to KRS Chapter 278. This distinction is significant because the Commission's jurisdiction is limited to matters pertaining to KRS Chapter 278. Bullitt Utilities did not derive its authority to provide service, maintain a tariff, or file a request for a surcharge from its corporate existence or from the structure it chose for holding its assets. Instead, Bullitt Utilities derived its authority to file a request for a surcharge from meeting the definition of a "utility" per KRS 278.010(3)(f), providing utility service, and collecting rates under a tariff for that service.

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<sup>85</sup> [See, <https://app.sos.ky.gov/corpsscans/75/0061375-09-99999-19760129-ART-4053989-PU.pdf> (Last visited Sept. 18, 2017)].

<sup>86</sup> *Boone County Water and Sewer District*, 949 S.W.2d at 591.

Through the Abandonment Case, Bullitt Utilities sought and obtained an order that permitted Bullitt Utilities to extinguish its obligation to provide utility service and, in turn, remove itself from the Commission's jurisdiction.<sup>87</sup> As a consequence of the abandonment, Bullitt Utilities voluntarily relinquished authority to collect rates from its former customers. For this reason, the Commission required BCSD, as receiver and the entity authorized to collect rates, to file an adoption notice of the tariffs of Bullitt Utilities.<sup>88</sup>

Thus, Bullitt Utilities, upon abandonment of its utility operations, no longer met the definition of a "utility" per KRS 278.010(3)(f) and no longer had the right to maintain a tariff and to collect rates. Therefore, Bullitt Utilities no longer had any interest in the First Surcharge Case. Consequently, the Commission found that Bullitt Utilities no longer had the right to prosecute the application and dismissed Bullitt Utilities as the applicant in the First Surcharge Case.<sup>89</sup> Nothing in the orders in the First Surcharge Case or the Abandonment Case permitted Bullitt Utilities to retain the status of a utility, as defined under KRS 278.010(3)(f), to operate or control the assets necessary to provide utility service, or reserve the right to file a tariff or collect rates for service.

The Trustee, on behalf of Bullitt Utilities, asserts that Bullitt Utilities remains a regulated utility subject to the Commission's jurisdiction.<sup>90</sup> Per the Trustee, Bullitt Utilities has a "service obligation to its customers."<sup>91</sup> Much of the Trustee's argument relies upon

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<sup>87</sup> Case No. 2015-00290 (Ky. PSC Oct. 16, 2015) at 2.

<sup>88</sup> Case No. 2014-00255 (Ky. PSC Oct. 16, 2015) at 5 and 6.

<sup>89</sup> *Id.* at 4 and 6.

<sup>90</sup> Trustee's Response (filed Jan. 13, 2017) at 2 and 3.

<sup>91</sup> *Id.* at 5.

the appointment of a state court receiver by the Franklin Circuit Court under KRS 278.021.<sup>92</sup> The Trustee's position is at odds with the plain meaning of KRS 278.021(2)(a), as then in effect and as applied to the facts of the Abandonment Case.

The Commission finds that Bullitt Utilities voluntarily abandoned its operations and, in turn, its service obligations upon entry of the Franklin Circuit Court order appointing a receiver. There is nothing in the record from the Abandonment Case suggesting that Bullitt Utilities had any intent to carve out or reserve a service obligation or that the abandonment that was requested and granted was anything other than unconditional. In granting abandonment, the Commission ordered Bullitt Utilities to continue to operate the Hunters Hollow collection system and related facilities until the earlier of the entering of an order by Franklin Circuit Court attaching the assets of Bullitt Utilities and placing those assets under the sole control and responsibility of a receiver or September 30, 2015.<sup>93</sup> The limited post-abandonment service obligation was for aiding the continuity of service. It did not create any right in favor of Bullitt Utilities to continue to control or operate the abandoned assets beyond, at the latest, September 30, 2015.

Hence, it is clear by the unambiguous findings in the August 31, 2015 Order in the Abandonment Case that the Commission was terminating Bullitt Utilities' service obligation no later than September 30, 2015. Bullitt Utilities did not seek rehearing of the August 31, 2015 Order. As stated in the Commission's October 16, 2015 Order in the Abandonment Case, the abandonment was effective upon the Franklin Circuit Court's entering an order attaching the assets and appointing a receiver on September 23,

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<sup>92</sup> *Id.* at 2 through 5.

<sup>93</sup> Case No. 2015-00290 (Ky. PSC Aug. 31, 2015) at 7.

2015.<sup>94</sup> Bullitt Utilities' service obligation terminated on September 23, 2015. While Bullitt Utilities' corporate existence was unaffected by the abandonment, its status as a utility clearly terminated.

The Trustee emphasizes that he has control of the assets of Bullitt Utilities, including Bullitt Utilities' "chose [in] action," the surcharge claim.<sup>95</sup> Nonetheless, the Trustee has noted that he has no greater rights than the rights possessed by Bullitt Utilities at the time of the initiation of Bankruptcy proceedings.<sup>96</sup> A review of the record demonstrates that the Trustee's right to pursue the surcharge claim is by reference to Bullitt Utilities' right to pursue the surcharge claim. The Trustee's acquisition of the Bullitt Utilities assets did not restore Bullitt Utilities' service obligation or set aside or vacate any orders from the Abandonment Case.

The Commission has the exclusive jurisdiction to determine who has authority to provide or abandon the utility services defined in KRS 278.010(3), and who may collect rates for providing service. The Commission finds that Bullitt Utilities' authority and obligation to provide utility service terminated on September 23, 2015. Again, as set out in the August 31, 2015 Order, the authority and obligation to provide utility service would have terminated on September 30, 2015, if the Franklin Circuit Court had not acted by that date. The Franklin Circuit Court's September 23, 2015 order attaching the assets simply determined the timing of the effective date of the abandonment and termination of

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<sup>94</sup> Case No. 2015-00290 (Ky. PSC Oct. 16, 2015) at 4 and 5.

<sup>95</sup> Trustee's Reply (tendered Feb. 1, 2017) at 3.

<sup>96</sup> Case No. 2014-00255, Response of the Chapter 7 Trustee (filed Jan. 29, 2016) at 7.

the service obligation. The transfer of control of these assets to the Trustee did not set aside the termination of the service obligation.

In summary, the control of the assets of Bullitt Utilities having shifted from the state court receiver to the Trustee did not create any new rights in the assets. Bankruptcy, therefore, did not restore Bullitt Utilities' status as a utility. As explained in the Commission's April 14, 2016 Order in the First Surcharge Case, "Bullitt Utilities voluntarily abandoned its utility assets and lost its right to seek a surcharge prior to the institution of bankruptcy proceedings."<sup>97</sup> The Commission's orders terminating Bullitt Utilities' authority and obligation to operate the Hunters Hollow system and terminating Bullitt Utilities' tariffs on file at the Commission have not been set aside. The Trustee has failed to demonstrate that Bullitt Utilities has any authority to file a tariff with the Commission.

Bullitt Utilities, since September 23, 2015, has provided no utility service to any customers in Bullitt County. The Commission is aware that Bullitt Utilities, the corporation that continued in existence after September 23, 2015 as distinguished from the "utility" that terminated on that date, owes substantial sums of money to its primary creditors Veolia and PECCo. The Commission notes the following regarding the liabilities of Bullitt Utilities. By no later than April 17, 2015, the date that Veolia was served with the Commission's Order in Case No. 2014-00255 that denied Veolia's motion to intervene in the First Surcharge Case, Veolia was on notice that as a creditor of Bullitt Utilities it had no interest in the First Surcharge Case. Veolia did not seek judicial review of the April 16, 2015 Order.

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<sup>97</sup> Case No. 2014-00255 (Ky. PSC Apr. 14, 2016) at 9.



As the Commission noted in denying intervention, “Veolia is a creditor of Bullitt Utilities, not a customer.”<sup>98</sup> As further noted, “Veolia pays no rates to Bullitt Utilities and Veolia receives no service from Bullitt Utilities.”<sup>99</sup> Thus, by no later than April 17, 2015, Veolia and the remaining creditors of Bullitt Utilities were on notice that the pursuit of the protection of their interests as creditors was a matter for forums other than the Public Service Commission.

The Commission also points out that Veolia moved for intervention in the Franklin Circuit Court Receivership case and was denied intervention in that proceeding by an order of the Franklin Circuit Court entered on September 24, 2015.<sup>100</sup> Veolia did not appeal the order. Thus, by no later than September 24, 2015, Veolia and the remaining creditors were on notice that the pursuit of the protection of their interests in Bullitt Utilities was a matter to be advanced through initiating other proceedings in state or federal courts rather than through the Franklin Circuit Court Receivership case.

Under the version of KRS 278.021 in effect in 2015, the Commission was required to find that Bullitt Utilities had abandoned its utility upon Bullitt Utilities’ meeting the criteria of KRS 278.021(2)(a). While the abandonment provisions in KRS Chapter 278 were subsequently revised in 2016 to authorize the Commission to permit the imposition of terms and conditions as the Commission deems necessary or appropriate in a sewer abandonment, that authority did not exist at the time of the August 31, 2015 Order in the

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<sup>98</sup> Case No. 2014-00255 (Ky. PSC Apr. 16, 2017) at 5.

<sup>99</sup> *Id.* at 5 and 6.

<sup>100</sup> Public Service Commission v. Bullitt Utilities, et al., Civil Action No. 15-CI-00946, Order (Franklin Circuit Court, Division II, Sept. 24, 2015).

Abandonment Case. The Commission was not authorized to consider the interests of the creditors in the Abandonment Case.

IT IS THEREFORE ORDERED that:

1. The Trustee's Motion to File a Reply is granted.
2. Bullitt Utilities' application for a surcharge is rejected.

By the Commission



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