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July 14, 2009

David A. Koenig, Esq.
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Re: Termination of Water Service

PSC STAFF OPINION 2009-006

Dear Mr. Koenig:

Commission Staff acknowledges receipt of your request for an opinion on a water district's authority to terminate water service for a customer's failure to pay an assessment owed to a sanitation district for the extension of sanitary sewer facilities.

Commission Staff understands the facts to be as follows:

Boone County Water District ("Boone District"), a water district organized pursuant to KRS Chapter 74, owns and operates facilities that distribute water to approximately 22,843 customers in Boone County, Kentucky.¹

Sanitation District No. 1 of Northern Kentucky ("SDNK1"), a sanitation district organized pursuant to KRS Chapter 220, owns and operates facilities that provide waste water and storm water services to Boone, Campbell and Kenton Counties.

KRS 220.380 authorizes SDNK1 to issue bonds and to assess property owners using the procedures set forth in KRS 107.010 to 107.220 to finance the construction of sanitary sewer extensions to unserved areas.

Under this statutory authority and internally developed procedures, a copy of which is attached to this opinion, SDNK1 determines the total cost of an extension project, including engineering, legal, and licensing fees; construction material and equipment costs; construction management costs; easement and land acquisition costs; and interest and

¹ *Annual Report of Boone County Water District to the Kentucky Public Service Commission for the Calendar Year Ended December 31, 2008 at 5, 27.*

financing costs. It then apportions this cost to the owners of all properties that the construction serves or otherwise benefits. This apportionment process includes a public hearing, a vote of affected property owners, and reviews of the proposed project and assessment methodology by SDNK1's Board of Directors and the county judge/executive.

After a final determination of the assessment amount is made for each lot or parcel to be served, the property owner may make a lump sum payment within 90 days of receipt of notice of the assessment. Those property owners that do not make a lump sum payment are subject to annual assessments to finance assessment bonds or another form of debt financing for the project. If SDNK1 does not use third party financing for the balance of the construction costs, it may impose a surcharge pursuant to KRS 220.515 to collect unpaid assessments. Regardless of the method used, SDNK1 has a lien upon the assessed properties in an amount equal to the unpaid balance.

Boone District currently discontinues water service to any of its customers that fail to pay their bills for sewer service to SDNK1 when SDNK1 directs such action. Boone District has complied with such requests in accordance with KRS 220.510.

Boone District reports that SDNK1 previously issued monthly statements related to unpaid assessments separately from its monthly bills for sewer service. It has reason to believe that SDNK1 is transferring charges for unpaid monthly assessments to customers' monthly sewer bill. If a customer fails to pay the assessment charge, Boone District reports, SDNK1 is requesting the discontinuance of water service.

Your letter presents the following question: May a public water utility terminate water service for a customer's failure to pay a monthly assessment owed to a sanitation district for sanitary sewer extension?

Commission Regulations clearly limit a public utility's right to discontinue for a customer's nonpayment for non-utility service. 807 KAR 5:006, Section 14(1) provides:

A utility may refuse or terminate service to a customer only under the following conditions . . .

(f) For nonpayment of bills. A utility may terminate service at a point of delivery for nonpayment of charges incurred for utility service at that point of delivery; however, no utility shall terminate service to any customer for nonpayment of bills for any tariffed charge without first having mailed or otherwise delivered an advance termination notice which complies with the requirements of Section 13(5) of this regulation.

The regulation permits a utility to discontinue service only for nonpayment of charges for the services that it provides. The Commission has permitted deviations from this regulation only in very limited circumstances.²

Notwithstanding this regulation, public water utilities must under certain circumstances discontinue a customer's water service when a customer fails to pay his bill for sewer service and his sewer service supplier requests discontinuance of the customer's water service. KRS 96.934 provides that a water supplier "shall discontinue water service" to a premises for a customer's failure to pay sewer service charges when the governing body of municipal sewer facilities identifies the delinquent customer and notifies the water supplier to discontinue water service. Similar statutory provisions exist for sewer construction districts,³ metropolitan sewer districts,⁴ and joint sewer agencies.⁵ To the extent that these statutes conflict with 807 KAR 5:006, Section 14, they control.⁶

KRS 220.510(1) places a similar obligation upon public water utilities whose customers receive sewer service from a sanitation district. It provides:

The board of directors shall, by resolution, determine the rates and compensation or rentals to be charged for the use of the sanitary works. The board of directors may provide for a sewer service charge to be imposed and collected, beginning at the time the plan for the improvement has been approved by the Environmental and Public Protection Cabinet and work is begun on plans and specifications for the improvement. The rates shall at all times be reasonable, taking into account the cost of the works, the cost of operation and maintenance, and the amount necessary for the amortization of the bonds issued to finance the works. The same schedule of rates and charges shall apply to all users of the same class. The rates shall be binding upon all users of the system. The board may alter and revise the rates in its discretion. **In case of failure of any user to pay for services rendered, the board may** compel payment and may enjoin further use until the payment is made, or it may institute an action in any court having jurisdiction for the recovery of charges for services rendered, or the board may, by a notice in writing, signed by its chairman or any member of said board, **notify the municipality, or person, firm, or corporation, which furnishes water to the user's premises, to shut**

² *Boone County Water and Sewer District*, Case No. 91-428 (Ky. PSC Apr. 4, 1991) (holding that a water and sewer district may discontinue water service for a customer's failure to pay bills incurred for sewer service that the district also provided); *Collection and Billing Practices of Privately-Owned Sewer Utilities*, Administrative Case No. 347 (Ky. PSC Jan. 9, 1995).

³ KRS 76.368.

⁴ KRS 76.090; KRS 76.640.

⁵ KRS 76.090; KRS 76.231(3).

⁶ *Kentucky-American Water Company*, Case No. 95-238 (Ky. PSC Jun. 30, 1995); *Hendron Water District*, Case No. 2004-00376 (Ky. PSC Dec. 12, 2004).

off the water service to said user's premises, until such time as all delinquent charges, plus a reasonable charge for turning off and on the water service, against said user, are paid in full. Upon receipt of such notice in writing, the municipality, or the person, firm, or corporation, which furnishes water to the said user's premises shall immediately shut off and discontinue the water service to the said user's premises. Upon full payment of such account, plus a reasonable charge for turning off and on the water service, the chairman, or any member of said board, shall notify the said municipality, person, firm, or corporation, which furnishes water to said user, that the account is paid in full, including such reasonable charge for turning off and on the water service, and that the said water service can again be provided to said user's premises. The board of directors shall promptly pay to such municipality, person, firm, or corporation, such fee or charge collected for turning off and on such water service. The board may enter into contracts with public corporations or other large users of sewer services. The board may provide by resolution any provisions and stipulations it deems necessary for the administration of the revenue of the district, and for the security of the bondholders. [Emphasis added.]

Clearly this statute requires Boone District to terminate water service to any customer that fails to pay SDNK1 for sewer service charges.

Based upon its review, Commission Staff is of the opinion that KRS 220.510(1) does not require a public water utility to terminate water service for unpaid charges related to an assessment for the construction of an extension made pursuant to KRS 220.515. KRS 220.510(1) refers to "services rendered," which suggests sewage or sanitary sewer services.⁷ Assessments relate specifically to the cost of facilities, not the provision of sewer service. Both KRS 220.380 and KRS 220.515, which authorize SDNK1's assessment procedures, refer to the cost of "sanitary works" or "facilities" to be acquired or constructed. KRS 220.515, moreover, expressly distinguishes charges that a sanitation district assesses under that statutory provision from those assessed for service under KRS 220.510. Such charges are assessed "in addition to the charge authorized by KRS 220.510."⁸

The legislative history of KRS Chapter 220 and Chapter 76 supports this conclusion. KRS 220.510 was enacted in 1940.⁹ The provisions related to

⁷ See *City of Covington v. Sanitation District No. 1 of Campbell and Kenton Counties*, 301 S.W.2d 885, 890 (Ky. 1957) ("The sewer service contemplated to be given the sewer user in consideration of the charge imposed upon him is being rendered. The sewage is in fact being removed from the premises of the various users. The interceptors, trunks, lifts, and pumps are all in operation.")

⁸ KRS 220.515 also authorizes "a finance charge not to exceed 10 percent" for unpaid assessments. This provision would be unnecessary if these assessments were considered as charges for sewer service. SDNK1, for example, had been assessing a finance charge on 10 percent on any unpaid bills for sewer service since on or before February 10, 1986. See, e.g., *Sanitation District No. 1 of Campbell and Kenton Counties*, PSC No. 1, 3rd Revised Sheet No. 1.

⁹ 1940 Ky.Acts 563.

discontinuance of water service were added to KRS 220.510 in 1948.¹⁰ In 1966 the General Assembly enacted KRS 220.595¹¹ and specifically provided that delinquent assessment payments owed for sanitation construction district¹² could serve as the basis for discontinuance of water service:

The district is granted the same authority relative to the cutting off of the water supply of its delinquent users within a construction subdistrict as is contained in KRS 220.510 relative to other territory under the jurisdiction of the district. **Delinquents include persons or users who have failed to make timely payment of any assessment authorized by KRS 220.553 to 220.613, or any payment required by KRS 220.591** [emphasis added].

A separate authorization for termination of delinquent assessment payments would not have been necessary if the General Assembly interpreted the phrase “pay for services rendered” as used in KRS 220.510 as including the payment of assessments for improvements or extensions.¹³

In 1976 the General Assembly authorized metropolitan sewer districts to use the procedures set forth in KRS 107.010 to 107.220 to construct wastewater collection projects.¹⁴ Although KRS 76.090 already authorized the termination of water service to any metropolitan sewer district customer who failed to pay “sewer rates, rentals, or charges for services,”¹⁵ the General Assembly enacted KRS 76.640 to expressly authorize such district to enforce the payment of assessments for such projects by directing the termination of water service. When in 1994, the General Assembly conferred upon sanitation districts the authority to use the procedures set forth in KRS Chapter 107,¹⁶ it did not similarly provide that a customer’s failure to make a timely

¹⁰ 1948 Ky.Acts 301.

¹¹ 1966 Ky.Acts 493.

¹² A construction subdistrict is a subunit of a sanitation district. It is created to pay for the construction of facilities that are intended to benefit and serve only the territory within the subdistrict. The construction cost of these facilities is borne only by the residents of the subdistrict and not by other residents of the sanitation district.

¹³ See *White v. Commonwealth*, 178 S.W.3d 470, 482 (Ky. 2005) (“We endeavor to read statutes so as to avoid redundancy. This approach to statutory construction is necessary because the “result [of allowing the redundancy] violates the ‘universal rule ... that in construing statutes it must be presumed that the Legislature intended *something* by what it attempted to do.”) (citations omitted). Further evidence that the Legislature did not intend “payment for services rendered” to include assessment payments is found in KRS Chapter 76, which deals with metropolitan sewer districts. KRS 76.090 requires a water supplier to discontinue water service to any customer who becomes delinquent in his payment of “sewer rates, rentals, or charges for services.”

¹⁴ 1976 Ky.Acts (Ex. Session) 38-51.

¹⁵ KRS 76.090(4).

¹⁶ 1994 Ky.Acts Ch. 490, §4.

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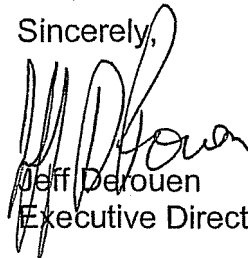
payment of an assessment was grounds for discontinuance of the customer's water service. It also failed to make such provision in 1998 when it enacted KRS 220.515 which provided for a separate rate to recover the cost of constructed or acquired facilities.¹⁷ This failure also suggests a legislative intent to withhold from sanitation districts the remedy of discontinuance of water service for nonpayment of assessments.

As KRS 220.510 does not authorize the discontinuance of water service for a customer's failure to pay a sanitation district assessment, no statutory basis for discontinuance of water service exists and 807 KAR 5:006, Section 14, is controlling. Boone District, therefore, may not terminate a customer's water service for a delinquent assessment made pursuant to KRS 220.515.¹⁸

Under the present circumstances, Commission Staff recommends that before discontinuing water service to any customer based upon a termination notice from SDNK1 for delinquent payments, Boone District should receive written assurance from SDNK1 that the delinquent payments are not solely related to an assessment for an extension or improvement made pursuant to KRS 220.515. If Boone District wishes to discontinue water service to a customer based solely on the customer's failure to pay to SDNK1 such assessment, it should seek a deviation from 807 KAR 5:006, Section 14.

This letter represents Commission Staff's interpretation of the law as applied to the facts presented. This opinion is advisory in nature and not binding on the Commission should the issues herein be formally presented for Commission resolution. Questions concerning this opinion should be directed to Gerald Wuetcher, Executive Advisor, at (502) 564-3940, Extension 259.

Sincerely,



Jeff Derouen
Executive Director

Enclosure

¹⁷ 1998 Ky.Acts Ch. 234 §1.

¹⁸ Boone District is required to terminate service for delinquent subdistrict assessment payments. See KRS 220.595.