

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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In the Matter of:

JOINT APPLICATION OF R. A. WILLIAMS)
CONSTRUCTION COMPANY, INC AND)
CEDARBROOK UTILITIES, LLC FOR) Case No. 2008-00040
APPORVAL OF THE TRANSFER OF)
WASTEWATER TREATMENT PLANT TO)
CEDARBROOK UTILITIES, LLC)

**ATTORNEY GENERAL'S RESPONSE TO COMMISSION ORDER DATED
21 MAY 2008**

Comes now the intervenor, the Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention, and files this response to the Commission's Order dated 21 May 2008. Prior to responding to the questions, the Attorney General first states that he has great concerns for the future welfare of the customers. In particular, without maintaining adequate sewage services for the customers, the structures in which they live could be condemned. This is an unacceptable situation and must be addressed as expeditiously as possible.

ATTORNEY GENERAL'S RESPONSES

1. What terms and conditions, if any, are necessary and appropriate to render the proposed transfer of control of the wastewater treatment plant from R. A. Williams Construction Company to Cedarbrook Utilities, LLC ("Cedarbrook") in the public interest?

RESPONSE

The transfer of ownership or control of a public utility requires Public Service Commission approval. KRS 278.020. The Commission has the authority to place conditions upon approval in order to protect the utility and its customers. The primary concern of the Attorney General is that R. A. Williams Construction wants to walk away from a utility in crisis.

To the extent that R. A. Williams has failed to seek timely adjustments in utility rates, failed to adequately fund the capital construction requirements of the utility, and failed to properly maintain this system, R. A. Williams should be required to infuse capital in order to eliminate the adverse effects of its management. The innocent ratepayers should not be left to bear the responsibility for R. A. Williams Construction's decision-making process.

In the absence of a capital infusion, the new owners – and in turn the ratepayers – will be left with a utility with a massive capital spending requirement. To be clear on one point, the approximate \$150,000 to \$200,000 of anticipated spending for necessary collection system improvements will require a certificate of convenience and public necessity. The Attorney General does not

concede that the base of ratepayers (approximately 51) is sufficiently large to support such a project as economically feasible. See *Kentucky Utilities Company v. Public Service Commission*, 252 S.W.2d 885 (Ky. 1952)(convenience and necessity for a new service facility requires a showing of substantial inadequacy of existing service, involving a consumer market sufficiently large to make it economically feasible for the new system or facility to be constructed and operated). Hence, there is substantial risk for the discontinuance of service. Accordingly, a capital infusion is a condition necessary to protect the public interest.

Through an Agreed Order in EPPC File No. DOW-33217-156, R. A. Williams is under an obligation to convey this facility to a third-party approved by the Public Service Commission. The Agreed Order does not, in any way, change the Commission's statutory assignment under KRS 278.020 or its ability to impose conditions upon R. A. Williams. Otherwise stated, the Agreed Order does not preclude the imposition of a capital infusion condition.

2. What is the AG's position regarding Cedarbrook's statement that a surcharge upon the customers of the wastewater treatment plant is a possible alternative to fund a portion or all of the costs of repairing the existing wastewater collection and treatment system?

The Attorney General does not object, *per se*, to this question. He does, however, note that it is premature. The question assumes two facts that are, at minimum, contested. It is not clear that the customers should be called upon to pay a portion or all of the costs of repairing this existing wastewater collection and treatment system. Second, in terms of economic feasibility, it is not clear that the ratepayers can pay the costs. Furthermore, a specific surcharge proposal is not before this Commission in this proceeding; therefore, the question is purely hypothetical. The Attorney General reserves the right to revisit his position (and also change it) upon the filing of a request for the authority to impose a surcharge.

The PSC, as a creature of statute, must have a statutory basis of authority in order to approve each specific rate-making treatments listed. That stated: there is no express statutory authority for a surcharge to fund a portion or all of the costs for repairing the existing wastewater collection and treatment system. Nonetheless, the legislature's grant of express authority carries with it a judicially recognized power of authority by implication through which the Commission may take actions that are strictly necessary in order to prevent a

discontinuance of service or to address a utility facing bankruptcy.¹ The judiciary's recognition of Commission power by implication for such a purpose is quite narrow, and it does not reflect an expansion of Commission power. Indeed, the judiciary does not recognize any theory of Commission authority by implication through which the Commission may expand its jurisdiction/authority.

There are grave concerns about the condition of this utility and its ongoing financial viability. Bankruptcy and the discontinuance of service both loom. The express statutory provisions do not provide a specific remedy for preventing or otherwise addressing the threat to continuation of service. Hence, crafting a surcharge mechanism for the narrow purpose of utility viability (rather than regulatory convenience, easing an administrative burden, or regulatory expediency) is an option within the Commission's authority by implication given the very real threat to the viability of this utility and its ability to continue service in the absence of the action (which is strictly necessary).

In passing, determining the legality of an administrative agency's exercise of power in reliance upon a claim of authority by implication is done on a case-by-case basis. A mechanism that is strictly necessary under one set of facts (therefore valid) may be an invalid exercise of authority under a different set of facts. *See, for guidance and comparison, National Southwire Aluminum Co. v. Big*

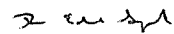
¹ The Attorney General recently argued the concept of necessarily implied authority in *Public Service Commission, et al. v. Commonwealth of Kentucky ex rel. Stumbo*, 2007-CA-001635. For purposes of convenience, the Attorney General attaches hereto as "Attachment A" a copy of his previously-filed brief in that matter. The brief speaks for itself.

Rivers Elec. Corp., 785 S.W.2d 503, 515 (Ky. App. 1990)(Commission has authority by implication to approve variable rate mechanism to prevent **bankruptcy** of Big Rivers).

Wherefore, the Attorney General tenders his response to the Commission's Order dated 21 May 2008.

Respectfully submitted,

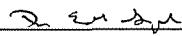
JACK CONWAY
ATTORNEY GENERAL



David Edward Spenard
Assistant Attorney General
1024 Capital Center Drive, Suite 200
Frankfort, KY 40601-8204
T 502-696-5457
F 502-573-8315

Certificate of Service and Filing

Counsel certifies that an original and ten photocopies of the Attorney General's Response to Commission Order Dated 21 May 2008 were served and filed by hand delivery to Stephanie Stumbo, Executive Director, Public Service Commission, 211 Sower Boulevard, Frankfort, Kentucky 40601; furthermore, it was served by mailing a true and correct of the same, first class postage prepaid, to Honorable Robert Moore, Hazelrigg & Cox, LLP, P.O. Box 676, Frankfort, Kentucky 40602, Ronald Osborne, R. A. Williams Development Co., Inc., 153 Prosperous Place, Suite 1A, Lexington, Kentucky 40509, and Lawrence Smither, 1706 Bardstown Road, Louisville, Kentucky 40205, all on this 3rd day of May 2008.



Assistant Attorney General