

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

JAN 29 2016

PUBLIC SERVICE
COMMISSION

IN THE MATTER OF:

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

CASE NO. 2014-00255

**RESPONSE OF THE CHAPTER 7 TRUSTEE FOR BULLITT UTILITIES, INC.
TO THE COMMISSION'S JANUARY 21, 2016 ORDER**

Robert W. Keats, not individually but now as the chapter 7 trustee (the "Trustee") for the bankruptcy estate of Bullitt Utilities, Inc. ("BU"), files this response to the *Order* entered by the Public Service Commission (the "PSC") on January 21, 2016 (the "Order") granting the *Trustee's Motion for Rehearing and Supplemental Motion for Rehearing* "for the limited purpose of considering the legal issues as described" in the Order. Order, January 21, 2016, p. 13, Ordering Paragraph No. 1.

On January 20, 2016, the United States Bankruptcy Court for the Western District of Kentucky (the "Bankruptcy Court") in the bankruptcy case proceeding as *In re Bullitt Utilities, Inc.*, Chapter 7 Case No. 15-34000-jal (the "Bankruptcy Case"), entered an order for relief (the "Bankruptcy Court Order") finding BU is a bankrupt debtor and directing the Bankruptcy Case to proceed. A copy of the Bankruptcy Court Order is attached as Exhibit A.

As a result of the Bankruptcy Court Order, the Trustee is now invested with the full powers of a bankruptcy trustee under title 11 of the United States Code (the "Bankruptcy Code"). Specifically, the Trustee is empowered to act for BU in all matters, not just the surcharge case. 11 U.S.C. §§ 323 & 704. The receiver for BU, the Bullitt County Sanitation District (the "BCSD"), has been divested of any power and authority to assert control over BU or its assets,

including, but not limited to, BU's surcharge claim. 11 U.S.C. § 543. Further, the automatic stay imposed by the Bankruptcy Code prohibits "the commencement or continuation ... of a judicial, administrative, or other action or proceeding against" BU, any act to "exercise control over property of [BU's bankruptcy] estate" and certain other actions that could be taken against BU. 11 U.S.C. § 362(a).

The Bankruptcy Court issued a Notice of Hearing on January 12, 2016 scheduling a Hearing for February 2, 2016 to discuss the Trustee's Status Report filed on January 8, 2016. The Trustee plans to conduct an informal meeting after the February 2, 2016 Hearing to determine if there is any proposal agreeable to all interested parties by which BU's creditors can be paid. The Trustee may renew his request for an informal conference at the offices of the PSC to discuss the surcharge case and other issues related to BU. An informal conference at the PSC could allow the parties to begin or continue the discussion for an amicable resolution of issues related to BU.

The Trustee addresses the five issues identified in the Order in the remainder of this response. The Trustee bases much of his response on the positions asserted by Perdue Environmental Contracting Company, Inc. and Veolia Water Technologies, Inc. ("Veolia") with which the Trustee agrees. As explained in more detail below, BU is a utility subject to the jurisdiction of the PSC. The orders entered by the PSC and the Franklin Circuit Court (the "FCC") do not change the authority of the PSC to approve the surcharge sought by BU. The automatic stay does not prevent the PSC from hearing the surcharge case or granting BU the authority to impose a surcharge, however, it does prohibit the PSC from entering or enforcing any order against BU and its assets. The automatic stay also prohibits the BCSD from attempting to assert control over BU's surcharge claim. The PSC's role as the plaintiff in the

receivership case has no impact on the PSC's jurisdiction over BU and ability to grant the Trustee, standing in the shoes of BU, any relief. The Trustee is not asserting any rights in the surcharge case that would not be available to BU.

The Trustee reserves the right to supplement or amend this response as it is being filed about a week before the PSC's deadline so it can be provided as an exhibit to the Trustee's Status Report being filed with the Bankruptcy Court today. The Trustee attaches all of the exhibits to this response for the convenience of the PSC and the parties so those documents will be easily available when reading this response.

1. **Whether under KRS 278.010(3)(f), BU is now a utility whose rates and services are subject to PSC jurisdiction**

BU is still a utility subject to the jurisdiction of the PSC under KRS 278.010(3)(f). BU would no longer be subject to the jurisdiction of the PSC only if under KRS 278.020(6) the PSC had granted the transfer of ownership or control of BU to an entity not otherwise subject to the jurisdiction of the PSC. Now, any proceeding to transfer the ownership or control of BU under KRS 278.020(6) is subject to prior approval by an order in the Bankruptcy Court. The orders entered by the PSC or the FCC in any of the BU cases do not make BU something other than a utility governed by the PSC.

The PSC's October 28, 2015 Informal Conference Memo reaches the same result. A copy of the Informal Conference Memo is attached as **Exhibit B**. The Commission Staff in discussing the options available to the BCSD as the receiver for BU "also stated that BCSD could file a transfer and control request, thus taking the issues outside the PSC's jurisdiction." Informal Conference Memo, October 28, 2015, p. 2. The Informal Conference Memo was issued over a month after the FCC order appointing the BCSD as receiver for BU and almost two weeks after the PSC substituted the BCSD for BU as allegedly the real party in interest. Yet, the

PSC Staff recognized that the BCSD still needed to file a proceeding to transfer the ownership and control of BU to the BCSD before BU would be outside the jurisdiction of the PSC. Neither the BCSD nor any other party has filed any document seeking to transfer the ownership and control of BU to another entity.

KRS 278.021(7), which is set forth below, provides additional support for the conclusion that nothing has changed the PSC's jurisdiction over BU.

The receiver shall control and manage the assets and operations of the utility until the [FCC], 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.

Other than a September 24, 2015 Order by the FCC denying Veolia's Motion to Intervene, there has been no other order from the FCC in the receivership case, and no order authorizing the BCSD either to return BU's assets to BU or to liquidate those assets. The liquidation of BU's assets is now governed by the Bankruptcy Court with the entry of the Bankruptcy Court Order.

The August 21, 2015 PSC Staff Opinion 2015-011 outlines an analysis of the state law regulatory scheme consistent with the above approach as it advises "a receivership is an arrangement through which the [FCC] places the assets of a utility under the sole control and responsibility of a receiver. A copy of the PSC Staff Opinion 2015-011 is attached as Exhibit C. The receiver does not, however, become the owner of the assets or the owner of the utility."

PSC Staff Opinion 2015-011, August 21, 2015, p. 6. The Staff Opinion quotes from KRS 278.021(7) to support its analysis. *Id.* The Staff Opinion concludes its discussion with:

Commission Staff further notes that KRS 278.021(6) states that the receiver acts on behalf of the utility. The foregoing observations support the proposition that a receiver controls the assets on behalf of the utility and does not become the owner of the assets or the owner of the utility by virtue of the receivership.

Id.

Even counsel for the BCSD acknowledged that the BCSD, as receiver for BU, never owned BU's assets. In a September 29, 2015 letter, the BCSD's counsel differentiated between the cash, assets and liabilities of BU and those of the BCSD. A copy of the September 29, 2015 letter from counsel for the BCSD is attached as Exhibit D.

The BCSD controlled, but did not own BU's assets. BU as the owner of the assets is still the same utility as it was before any of these proceedings. For all of the reasons set forth above, the PSC retains jurisdiction over the rates and services of BU.

2. **What rights and claims, if any, can now be asserted at the PSC by or on behalf of BU consistent with the orders of the Franklin Circuit Court and the PSC confirming BU's voluntary abandonment of all utility assets and the designation of the BCSD as the receiver**

The PSC's jurisdiction over BU is unchanged by any orders of the PSC or the FCC. BU can still assert the same rights and claims before the PSC as it could before any of those proceedings. The Order expresses concern that the FCC order appointing the BCSD as the receiver for the assets of BU, but not the receiver for the liabilities of BU, raises serious legal questions about BU's rights. Order, January 21, 2016, p. 11. The PSC's conclusions on this issue are misplaced, largely based on the same analysis in response to issue no. 1 above.

The Order continues by asking whether the FCC must modify or amend the order appointing the BCSD as the receiver for BU. *Id.* In a typical receivership governed by KRS 278.021, a later step presumably would be to return BU's assets to BU or establish a process for those assets to be liquidated for the benefit of BU as a result of an order from the FCC. As no such request was ever made to the FCC, BU is still the owner of all of its assets. The entry of the Bankruptcy Court Order eliminates any need to seek authority from the FCC as by operation of law the control of BU's assets is transferred from the BCSD to the Trustee, including all payments made by BU's customers. 11 U.S.C. §§ 323, 541 & 704.

3. **Whether, and if applicable to what extent and how, the stay referenced in the reply of the Trustee operates to prevent the PSC from conducting proceedings**

Section 362 of the Bankruptcy Code imposes an automatic stay which prohibits, among other things “the commencement or continuation ... of a judicial, administrative, or other action or proceeding *against*” a bankrupt debtor and any act to “exercise control over property of [a debtor’s bankruptcy] estate.” 11 U.S.C. § 362(a) (emphasis added). An action taken in violation of the automatic stay is void and without effect. *Smith v. First Am. Bank (In re Smith)*, 876 F.2d 524, 525-6 (6th Cir. 1989). A party injured by a willful violation of the automatic stay is entitled to “recover actual damages, including costs and attorneys’ fees, and, in appropriate circumstances, punitive damages.” 11 U.S.C. § 362(h). Although the automatic stay prohibits an action or proceeding from being pursued against a debtor or its bankruptcy estate, the automatic stay does not prohibit an action or proceeding from being pursued for the benefit of a debtor or its bankruptcy estate. *In re Bailey*, 421 B.R. 841, 849 (Bankr. N.D. Ohio 2009).

The automatic stay does not prohibit the PSC from hearing the surcharge case and approving the surcharge sought by BU. However, the Bankruptcy Court Order has divested the BCSD of its power to control BU and its assets, including the surcharge claim. Any effort by the BCSD to deny the Trustee the right to assert the surcharge claim on behalf of BU is a violation of the automatic stay, is void, and may result in an award of sanctions against the BCSD. Further, the automatic stay prohibits the PSC from entering or enforcing any order against BU and its assets.

4. **Whether the PSC, as plaintiff in the receivership case, has jurisdiction to grant the Trustee any relief**

The PSC’s role as the plaintiff in the receivership case does not expand or limit the jurisdiction of the PSC to grant the Trustee any relief for BU. KRS 278.021 establishes that the

receivership case only served as a vehicle by which the BCSD could be appointed as the receiver for BU and served no other purpose.

5. **Whether the Trustee, by virtue of his appointment by the Bankruptcy Court, and the automatic stay, possesses rights greater than those abandoned and can thus pursue on behalf of the creditors**

At the commencement of a bankruptcy case, a bankruptcy estate is created. 11 U.S.C. § 541(a). A debtor's bankruptcy estate is comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case." *Id.* Claims and causes of action are included as property of a debtor's bankruptcy estate. *Darrah v. Franklin Credit (In re Darrah)*, 337 B.R. 313, 316 (Bankr. N.D. Ohio 2005). "A trustee then administers the estate for the benefit of all a debtor's creditors. So as to effectuate this duty, the trustee is afforded with a number of powers. Among these, is the 'capacity to sue [.]' And so long as a chose-in-action remains a part of a debtor's bankruptcy estate, this authority to sue is exclusive to the trustee; a debtor may not, independent of the trustee, exercise legal authority over estate property." *Id.* (citations omitted).

The Trustee possesses all the rights available to BU, including the right to pursue the surcharge claim that was previously controlled by BU and then the BCSD as receiver for BU. For the purposes of the surcharge case and any proceeding before the PSC, the Trustee is acting on behalf of BU. For the purposes of the surcharge case, the Trustee does not contend he possesses any greater rights than those rights held by BU. No order by the PSC or the FCC has transferred the ownership of any of BU's assets to another party. As previously explained, the Bankruptcy Court Order transferred control of BU's assets to the Trustee.

The Trustee is uncertain why the PSC seems to believe the Trustee is asserting rights greater than those possessed by BU. If the PSC maintains this belief based on any reference to possible claims held by BU in the Trustee's Supplemental Motion for Rehearing, those claims

were included for illustrative purposes to demonstrate the change in circumstances which justify granting the Trustee's Motion for Rehearing, but are not claims the Trustee intends to assert in the surcharge case.

The Trustee knows BU has asserted claims against the BCSD for breach of contract and Veolia has alluded to possible claims against the BCSD as the receiver for BU for breach of its fiduciary duty. The Staff Opinion advises of scenarios in which a receiver might be liable for the debt of the utility for which it is a receiver based on its actions as the receiver. PSC Staff Opinion 2015-011 at 7. At this time the Trustee expresses no opinion on the validity of these claims, but assures the PSC that all potential claims available to BU will be investigated and viable claims will be pursued in the appropriate forum.

#

The Trustee also addresses the three questions to be considered by the PSC once it has determined the five legal issues outlined in the Order. Order at 12. First, this response establishes BU has legal rights under the control of the Trustee. Second, the Trustee has the authority to participate for BU in the surcharge case by entry of the Bankruptcy Court Order and the December 29, 2015 order from the Bankruptcy Court which preceded it. Third, as set forth above, by virtue of the Bankruptcy Court Order the Trustee has been granted complete and sole control over the surcharge claim. The Trustee's intervention in this case has already occurred by operation of law and needs no affirmative act from the PSC.

Finally, on the merits of the Trustee's Motion for Rehearing, as noted above, the change in circumstances for BU since the PSC dismissed the surcharge case have been just as dramatic as those on which the PSC relied in granting the Joint Motion to Dismiss the surcharge case filed by the BCSD and the Attorney General. Efficiency and economy dictate that the PSC consider all of the issues that reasonably can be considered in the surcharge case at this time. Kentucky

law does not require the refiling of another surcharge case which will lead the parties to the same place as they are now at considerable additional cost to all involved.

Respectfully submitted,



Robert W. Keats

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E-mail: rkeats@bellsouth.net

CHAPTER 7 TRUSTEE FOR BULLITT
UTILITIES, INC.

CERTIFICATE OF SERVICE

I certify that the Response Of The Chapter 7 For Bullitt Utilities, Inc. To The Commission's January 21, 2016 Order was mailed sufficient U.S. postage prepaid, on this 29th day of January 2016.

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UTILITIES

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CHAPTER 7 TRUSTEE FOR BULLITT
UTILITIES, INC.

EXHIBIT A

U.S. Bankruptcy Court Order 12/29/15

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

-----X	:	
In re:	:	Chapter 7
	:	
Bullitt Utilities, Inc.,	:	Case No. 15-34000
	:	
Alleged Debtor.	:	
-----X		

**ORDER GRANTING EMERGENCY MOTION OF THE
PETITIONING CREDITORS UNDER 11 U.S.C. §§ 105(a) AND 303(g)
FOR ORDER DIRECTING APPOINTMENT OF INTERIM TRUSTEE**

This matter coming before the Court on the *Emergency Motion of the Petitioning Creditors Under 11 U.S.C. §§ 105(a) and 303(g) for Order Directing Appointment of Interim Trustee* (the “Motion”)¹ filed by Veolia Water Technologies, Inc., formerly known as Veolia Water Solutions & Technologies North America, Inc. (together, “Veolia”), and Perdue Environmental Contracting Company, Inc. (“Pecco”) (collectively the “Petitioning Creditors”); the Court having reviewed the Motion; the Court having found that (i) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, (ii) venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409, (iii) this is a core proceeding pursuant to 28 U.S.C. § 157(b), and (iv) notice of the Motion was sufficient under the circumstances; and the Court having determined that good and sufficient cause having been shown; IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED.
2. An interim trustee shall be immediately appointed under section 303(g) of the Bankruptcy Code and shall have full authority and control over the surcharge claim and any related claims in the possession of the Alleged Debtor. The interim trustee shall promptly review the surcharge claim and the Surcharge Case, and then will make a determination regarding

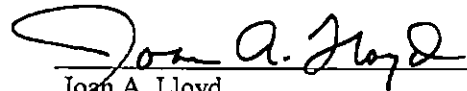
¹ Capitalized terms used herein but not otherwise defined shall have the meanings given to them in the Motion.

whether to reinstate the Surcharge Case, appeal the Surcharge Case or reassert the Surcharge Case.

3. This Court shall retain jurisdiction over any and all matters arising from the interpretation or implementation of this Order.

Tendered by:

James R. Irving
BINGHAM GREENEBAUM DOLL LLP
3500 National City Tower
101 South Fifth Street
Louisville, Kentucky 40202



Joan A. Lloyd
United States Bankruptcy Judge

Dated: December 29, 2015

EXHIBIT B

PSC Informal Conference Memorandum 10/28/2015

Steven L. Beshear
Governor

Leonard K. Peters
Secretary
Energy and Environment Cabinet



Commonwealth of Kentucky
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James W. Gardner
Chairman

Daniel E. Logsdon Jr.
Vice Chairman

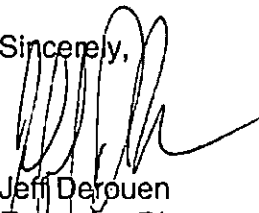
October 28, 2015

PARTIES OF RECORD

Re: Case No. 2014-00255

Attached is a copy of a memorandum which is being filed in the record of the above-referenced case. If you have any comments you would like to make regarding the contents of the memorandum, please do so within five days of receipt of this letter. Any questions regarding this memorandum should be directed to David Spenard, Commission Staff Attorney, at (502) 782-2580.

Sincerely,



Jeff Derouen
Executive Director

DES/ph

Attachment

INTRA-AGENCY MEMORANDUM
KENTUCKY PUBLIC SERVICE COMMISSION

TO: Case File No. 2014-00255
FROM: David Spenard, Staff Attorney
DATE: October 28, 2015
RE: Informal Conference of October 22, 2015

Pursuant to the Commission Staff's notice, an informal conference was held in this matter on October 22, 2015, to discuss the status of and issues in this case. Attending the conference were:

David Edward Spenard	-	Commission Staff
John B. Park	-	Commission Staff
Scott Lawless	-	Commission Staff
James Rice	-	Commission Staff
Mark Frost	-	Commission Staff
Mark Rasche	-	Commission Staff
Jeff Derouen	-	Commission Staff
Gregory Dutton	-	Kentucky Office of the Attorney General
Stefanie Kingsley	-	Kentucky Office of the Attorney General
(by telephone)		
Rob Flaherty	-	Bullitt County Sanitation District, Counsel
Jerry Kennedy	-	Bullitt County Sanitation District
Chuck Callahan	-	Bullitt County Sanitation District

At the start of the conference, Mr. Spenard stated that Commission Staff ("Staff") would prepare minutes of the conference for the case record, that a copy of the minutes would be provided to all parties, and that all parties would be given an opportunity to submit written comments upon those minutes. Mr. Spenard stated that the views of Staff were not binding on the Commissioners.

Staff provided a summary of the procedural history of the case. On July 17, 2014, Bullitt Utilities, Inc. ("Bullitt Utilities") filed a petition for a certificate of public convenience and necessity ("CPCN") and for a surcharge. The case resulted from a catastrophic failure of the steel aeration tank at Bullitt Utilities' Hunters Hollow wastewater treatment plant. On December 23, 2014, the Commission entered an Order that granted Bullitt Utilities a CPCN to proceed with the construction of a proposed lift station, installation of a line connecting the Hunters Hollow collection system to the

Bullitt County Sanitation District's ("BCSD") wastewater treatment system, and the installation of two flow meters.

Although the Commission granted Bullitt Utilities a CPCN, Bullitt Utilities did not cure the deficiencies for its request for a surcharge until February 24, 2015. Staff noted that the Commission held an evidentiary hearing on the surcharge application on June 9, 2015. Staff stated that pursuant to KRS 278.190, the Commission must render a decision on the surcharge application on or before December 23, 2015. Staff stated the Commission had not made a decision regarding the surcharge application.

Staff noted that while the surcharge application was pending, Bullitt Utilities filed an application for a Commission Order that would allow Bullitt Utilities to abandon its utility operations for the Hunters Hollow collection system. The Commission entered an Order granting the abandonment, and the Commission petitioned the Franklin Circuit Court for an Order attaching the assets of Bullitt Utilities and for the appointment of a receiver. The Franklin Circuit Court entered an Order attaching the assets of Bullitt Utilities, and BCSD has been appointed receiver. Staff stated that BCSD, as receiver, now has taken the place of Bullitt Utilities as the applicant in the surcharge proceeding.

Staff noted that both the Commission's Order on abandonment requires Bullitt Utilities to safeguard all books, records, reports, plans, studies, files and other documents that relate to the location of facilities, the condition of the utility or the provision of service until all such items can be delivered to BCSD as receiver. Further, the Franklin Circuit Court Order provides BCSD with the sole control and responsibility for the assets of Bullitt Utilities. BCSD stated that it had received some of the information from Bullitt Utilities. BCSD stated that it would request Bullitt Utilities to provide all remaining information; further, BCSD noted that it would contact the Commission in the event of a problem in obtaining information from Bullitt Utilities.

BCSD noted that there is a connection of the Hunters Hollow collection system with the BCSD system that utilizes an existing (modified) wet well of the Hunters Hollow collection system. BCSD stated that it is operating the pumps for the connection and the connection is functioning. BCSD stated that it does not intend to construct the proposed project that was the subject of the Commission's December 23, 2014 grant of a CPCN, at this time and in the alternative would prefer to address the Infiltration/Inflow ("I/I") issues first.

Staff stated that BCSD, as receiver, has the power to make decisions regarding the pending application for a surcharge. BCSD's options include allowing the case to proceed and wait for a decision; making a motion to amend the application; and making a motion to withdraw the application. Staff also noted that BCSD could ask that the application be dismissed without prejudice. Staff also stated that BCSD could file a transfer and control request, thus taking the issues outside the PSC's jurisdiction.

BCSD stated that it has been the receiver for a relatively short period of time. BCSD stated that it would consider all options. Jerry Kennedy asked, in the event that a surcharge was granted, if BCSD could spend the surcharge proceeds on I/I. Staff noted that a decision had not been made on the surcharge; further, Staff noted that a surcharge application differs from a general request to increase utility rates. To date, when approving a surcharge, the Commission has normally limited the purposes for which surcharge proceeds may be applied.

Staff and the parties discussed the records concerning the customers of the Hunters Hollow collection system and also the records concerning claims made by the vendors of Bullitt Utilities. Staff asked whether BCSD had any knowledge as to the validity of the claims, the claims that have been paid, and the amounts that have been paid.

Staff and the parties discussed issues related to the transfer of the Hunters Hollow collection system into the BCSD system. BCSD stated that the debt of Bullitt Utilities was an issue.

The Kentucky Office of the Attorney General ("OAG") stated that it is willing to work with BCSD.

BCSD stated that it would provide an update on or around Thursday, November 12, 2015.

There being no further business, the informal conference adjourned.

Enclosure

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF BULLITT COUNTY SANITATION)	
DISTRICT AS RECEIVER FOR THE ASSETS OF)	
BULLITT UTILITIES, INC. FOR A CERTIFICATE OF)	CASE NO.
CONVENIENCE AND NECESSITY AND SURCHARGE)	2014-00255
FOR SAME)	

SIGN IN

October 22, 2015

PERSON

REPRESENTING

<u>David Edward Spencer</u>	<u>PSC Commission Staff</u>
<u>Gregory Dutton</u>	<u>OAG</u>
<u>Stefanie Kingsley</u>	<u>OAG</u>
<u>Scott Lawless</u>	<u>PSC Staff</u>
<u>John B. Park</u>	<u>PSC Staff</u>
<u>Rob Flaherty</u>	<u>Bullitt County Sanitation District</u>
<u>Derry Kennedy</u>	<u>Bullitt County Sanitation District</u>
<u>Chuck Callahan</u>	<u>Bullitt County Sanitation District</u>
<u>Mark Rasche</u>	<u>PSC Staff</u>
<u>JAMES RICE</u>	<u>" "</u>
<u>Mark Frost</u>	<u>PSC Staff</u>
<u>Jeff Deenon</u>	<u>PSC Executive Director</u>

*Bullitt County Sanitation District
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*Rob Flaherty
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*John Wooldridge
P.O. Box 1446
Shepherdsville, KENTUCKY 40165

EXHIBIT C

PSC Staff Opinion 2015-011



Steven L. Beshear
Governor

Leonard K. Peters
Secretary
Energy and Environment Cabinet

Commonwealth of Kentucky
Public Service Commission
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David L. Armstrong
Chairman

James W. Gardner
Vice Chairman

Daniel E. Logsdon, Jr.
Commissioner

August 21, 2015

PSC STAFF OPINION 2015-011

S2 Law, LLC
Attention: Scott Stutler
417 Helm Lane
Mt. Washington, Kentucky 40047

Re: Bullitt County Sanitation District request for Advisory Opinion regarding receivership for abandoned utility.

Dear Mr. Stutler:

Commission Staff acknowledges receipt of your August 14, 2015, request, on behalf of Bullitt County Sanitation District ("BCSD"), for an Opinion on four (4) questions regarding receivers and a receivership of an abandoned utility. This opinion represents Commission Staff's interpretation of the law as applied to the facts presented, is advisory in nature, and is not binding on the Commission should the issues herein be formally presented for Commission resolution. Commission Staff notes that the questions presented are very general in nature, and the responses provide general guidance on each topic. Commission Staff also notes that its interpretation of the law is not binding on a court.

Based upon your request, Commission Staff understand the facts as follows:

You are counsel for BCSD. Bullitt Utilities, Inc. ("Bullitt Utilities") is an entity operating in Bullitt County, Kentucky, and which provides sewer service in an area of Bullitt County known as Hunters Hollow. BCSD is concerned about a possible abandonment of the wastewater treatment facility owned by Bullitt Utilities. You believe that Bullitt Utilities has incurred substantial debt in conjunction with its operation of the Hunters Hollow plant, and the amount of debt may be in excess of \$3.0 million.

Commission Staff notes the following additional facts:

Bullitt Utilities is a for-profit Kentucky corporation that owns, controls, operates, or manages facilities used or to be used for or in connection with the collection, transmission, or treatment of sewage for the public, for compensation in Bullitt County. Bullitt Utilities is located in a county other than a county containing a city of the first class, and its treatment facility plant is not subject to regulation by a metropolitan sewer district or any sanitation district created pursuant to KRS Chapter 220. Pursuant to KRS 278.010(3)(f), Bullitt Utilities is a "utility," and its rates and service are subject to the jurisdiction of the Kentucky Public Service Commission.¹

Bullitt Utilities is a party to two cases currently pending before the Commission. By an Order entered on May 22, 2014, the Commission opened an investigation into the issues surrounding Bullitt Utilities' provision of wastewater treatment service.² On July 17, 2014, Bullitt Utilities filed a Petition for Certificate of Convenience and Necessity and for Surcharge.³ Both of the cases concern a catastrophic failure of the steel aeration tank at Bullitt Utilities' Hunters Hollow wastewater treatment plant ("WWTP") on March 29, 2014.⁴ On May 27, 2015, BCSD began accepting wastewater of the Hunters Hollow collection system pursuant to an agreement between BCSD and Bullitt Utilities.⁵

Your request presents the following questions:

¹ KRS 278.040.

² Case No. 2014-00163, *An Investigation of Existing and Future Service of Bullitt Utilities, Inc.*, (KY PSC May 22, 2014).

³ Case No. 2014-00255, *Application of Bullitt Utilities, Inc., for a Certificate of Convenience and Necessity, and Surcharge for Same*, (filed Jul. 17, 2014). Note: Bullitt Utilities did not meet the minimum filing requirements for its application until February 24, 2015.

⁴ See Case No. 2014-00255, Order (Jul. 21, 2014) at Appendix, Exhibit 4 (Kentucky Energy and Environment Cabinet, Department for Environmental Protection, Division of Water, Wastewater Inspection Report, dated Apr. 2, 2014).

⁵ See Case No. 2014-00163, Public Service Commission Letter Filing of May 28, 2015, Letter from Robert Moore, Counsel for Bullitt Utilities, to Ann Ramser, Staff Attorney, Kentucky Public Service Commission.

1. In a scenario in which a receiver is appointed for Bullitt Utilities, what is the responsibility of the receiver as it relates to the debt of Bullitt Utilities?
2. Would the receiver be obligated to use the revenues from the operation of the facility to pay those debts?
3. Would any of the liability for the debt of Bullitt Utilities be transferred to the receiver?
4. Would the receiver be strictly responsible for making sure that the plant continued to operate and would the receiver be able to use whatever revenues were generated from the plant toward that end?

KRS 278.020(5) provides:

No person shall acquire or transfer ownership of, or control, or the right to control, any utility under the jurisdiction of the commission by sale of assets, transfer of stock, or otherwise, or abandon the same, without prior approval by the commission. The commission shall grant its approval if the person acquiring the utility has the financial, technical, and managerial abilities to provide reasonable service.

KRS 278.021 provides:

- (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 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 an 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 as 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.

KRS 31A.080 provides:

(1) Receivers, except as provided in subsection (2) of this section, may be appointed under the same terms and conditions as a master Commissioner.

(2) Except for personal representatives, guardians, curators and committees for persons of unsound mind, neither a party to an action, nor his attorney, nor any person interested therein, shall be appointed as a receiver unless by agreement of the parties.

Kentucky Rule of Civil Procedure ("CR") 66 provides:

An action wherein a receiver has been appointed shall not be dismissed except by order of the court. The practice in the administration of estates by receivers or by other similar officers appointed by the court shall be in accordance with the Kentucky Revised Statutes and with the practice heretofore followed in the courts of this state. In all other respects, the action in which the appointment of a receiver is sought or which is brought by or against a receiver is governed by these rules.

Pursuant to KRS 278.020(5), Bullitt Utilities is required to obtain the prior approval of the Commission in order to abandon ownership of, or control, or the right to control the utility. Bullitt Utilities is, therefore, required to seek such an approval through a filing with the Kentucky Public Service Commission, and the issue of abandonment would be determined in an administrative proceeding. Pursuant to KRS 278.021(1), if the Commission, after notice and a hearing, enters an Order, in the administrative proceeding, in which it finds that a utility is abandoned, the Commission may then bring a judicial action in the Franklin Circuit Court for an order attaching the assets of the abandoned utility and placing those assets under the sole control and responsibility of a receiver.⁶

The role of the receiver, pursuant to KRS 278.021, includes the following:

- The receiver shall operate the utility to preserve its assets, to restore or maintain a reasonable level of service, and to serve the best interest of its customers. KRS 278.021(5);
- The receiver may bring or defend any cause of action on behalf of the utility. KRS 278.021(6);

⁶ KRS 278.021(8) provides for the authority for the Commission to petition the Franklin Circuit Court for the appointment of a temporary receiver. While the appointment process for a temporary receiver differs from the appointment process for a receiver through KRS 278.021(1), the discussion contained in this Staff Opinion is general in nature and sufficient to provide guidance as to a receiver's responsibilities, in terms of the questions you present, whether appointed pursuant to KRS 278.021(1) or KRS 278.021(8).

- The receiver may perform acts on behalf of the utility as the court may authorize. KRS 278.021(6); and
- 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. KRS 278.021(7).⁷

Commission Staff notes that, pursuant to KRS 278.021, a receivership is an arrangement through which the Franklin Circuit Court places the assets of a utility under the sole control and responsibility of a receiver. The receiver does not, however, become the owner of the assets or the owner of the utility. Per 278.021(7), the receiver's control and responsibility over the assets terminates upon one of two events: (1) The Court orders the receiver to return control of the assets to the utility; or (2) The Court orders the receiver to liquidate the assets as provided by law.⁸ Therefore, under the first scenario, it is clear that, although control of the assets is vested with the receiver (subject to the Court's supervision), title to the property remains with the utility, which continues to exist during the receivership. Under the latter, second scenario, although control of the assets is vested with the receiver, if the Court determines that the assets should not or cannot be returned to the utility, the receiver liquidates the assets as provided by law.⁹ Commission Staff further notes that KRS 278.021(6) states that the receiver acts on behalf of the utility. The foregoing observations support the proposition that a receiver controls the assets on behalf of the utility and does not become the owner of the assets or the owner of the utility by virtue of the receivership.

1. In a scenario in which a receiver is appointed for Bullitt Utilities, what is the responsibility of the receiver as it relates to the debt of Bullitt Utilities?

Bullitt Utilities is a Kentucky for-profit corporation. The debt of Bullitt Utilities at the time of the appointment of a receiver remains a liability of Bullitt Utilities. KRS 278.021 does not contain a provision through which the Franklin Circuit Court assigns the debt of Bullitt Utilities to the receiver at the commencement of the receivership.

KRS 278.021 does not expressly state the receiver's role regarding debt. KRS 278.021(6) authorizes the receiver to bring or defend any cause of action on behalf of the utility; therefore, if a creditor brought an action against Bullitt Utilities during the

⁷ The receiver shall also file a bond in an amount fixed by the court. KRS 278.021(5).

⁸ For a temporary receiver appointed pursuant to KRS 278.021(8), the control and responsibility for the assets terminates 60 days after the entry of the order of temporary receivership and the assets revert to the utility without further action of the Court unless the Commission brings an action under KRS 278.021(1).

⁹ In the absence of a specific set of facts regarding a scenario in which the Court orders liquidation, Commission Staff declines to express an opinion on liquidation.

pendency of the receivership, the receiver would be authorized to act to defend. KRS 278.021(6) also allows the receiver to perform acts on behalf of the utility as the Court may authorize. Therefore, the responsibility of the receiver as it relates to the debt of Bullitt Utilities depends on the extent of the authority granted by the Court. If the Order appointing the receiver contains authorization for the receiver to negotiate with creditors and make payments to creditors, then the receiver would have the authority to, while in control of the assets of Bullitt Utilities, act on behalf of Bullitt Utilities with regard to the debt. On this point, though, it is important to emphasize that the authority of the receiver to act would need to be express through an order of the Circuit Court, and the receiver might be best served by obtaining instructions of the Court through additional Orders on questions relating to the receiver's duties concerning the debt of Bullitt Utilities as such questions arise.

Commission Staff notes that there could be scenarios in which a receiver might become liable for debt based upon the actions of the receiver. For example, if a receiver executed a debt instrument or agreement relating to the debt of Bullitt Utilities in a capacity other than as receiver or in excess of the powers authorized by statute or Court orders, then the actions could raise issues as to whether the receiver, through its own conduct, has assumed or accepted liability for the debt. Of particular concern would be any arrangement by the receiver to incur additional debt or restructure debt on behalf of Bullitt Utilities. At minimum, the receiver would likely want to obtain an order of the Court authorizing the action before entering into any such arrangement. Depending on the arrangement, the receiver might also be required to obtain an approval of the Public Service Commission as well.¹⁰

2. Would the receiver be obligated to use the revenues from the operation of the facility to pay those debts?

As discussed in the response to the prior question, the receiver's responsibilities with regard to the debt of Bullitt Utilities depend upon the authority granted and instructions given to the receiver by the orders of the Franklin Circuit Court and statutes that are not within KRS Chapter 278. Commission Staff is of the view that the Franklin Circuit Court has the authority, pursuant to KRS 278.021, to authorize a receiver to utilize the revenues from Bullitt Utilities to pay the debts of Bullitt Utilities if the payments are necessary for the receiver to meet the requirements of or otherwise carry out the intent of KRS 278.021. Staff observes, nonetheless, that if the revenues of the utility operations are not sufficient to pay all costs and claims of the operations of the utility, then the receiver may want to obtain instructions, through an order of the Franklin Circuit Court, that prioritizes the application of the revenues from the operation of the facility in the event that revenue is not sufficient to meet all pending costs and claims.

3. Would any of the liability for the debt of Bullitt Utilities be transferred to the receiver?

¹⁰ See KRS 278.300.


Commission Staff notes that KRS 278.021 does not authorize the Franklin Circuit Court to transfer the debt to a receiver upon the appointment of the receiver. The debt remains a liability of Bullitt Utilities. The Court could, however, include instructions through an order as to the receiver's role in controlling the assets as it relates to the debt of Bullitt Utilities. As discussed in the response to the first question, there are scenarios in which the receiver, through its own actions, could become liable for a debt of Bullitt Utilities. The receiver is a fiduciary in possession of the assets of another party, and, as with other fiduciaries such as an executor, executrix, administrator, or administratrix, a receiver could take actions that raise issues as to whether the receiver has assumed or accepted liability for the debt. However, as noted, KRS 271.021 does not authorize the Franklin Circuit Court to transfer or assign the liability for the debt of Bullitt Utilities to a receiver as part of the appointment process. As long as the receiver acts within its capacity as receiver and within its grant of authority, by statute and Court order, Staff takes the position that the liability for the debt of Bullitt Utilities could not be involuntarily transferred to the receiver.

4. Would the receiver be strictly responsible for making sure that the plant continued to operate and would the receiver be able to use whatever revenues were generated from the plant toward that end?

KRS 278.021(5), in pertinent part, requires the receiver to "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." Staff notes that receiver would be required to use the revenue received for carrying out the duties stated in KRS 278.021. Staff notes that, per KRS 278.021(6), the receiver "may" bring or defend any cause of action on behalf of the utility. On this point, the responsibility that the receiver may exercise in terms of bringing or defending a cause of action is not strictly limited to making sure that the utility plant continues to operate.

This letter represents Commission Staff's interpretation of the law as applied to the facts presented for your questions. As noted, the opinion is advisory in nature and is not binding on the commission should the issues herein be formally presented for Commission resolution; additionally, the opinion is not binding on a Court. Questions concerning this opinion should be directed to David Spenard, Staff Attorney, at (502) 782-2580.

Sincerely,



Jeff Derouen
Executive Director

DS/ph

EXHIBIT D

BCSD's Counsel's September 29, 2015 Letter



Office of
JOHN W. WOOLDRIDGE
BULLITT COUNTY ATTORNEY

(502)543-1505
www.bullittcountyattorney.com



September 29, 2015

Bullitt County Sanitation District
P.O. Box 818
Hillview, KY 40129

Re: Bullitt Utilities, Inc.

Lady and Gentlemen:

This letter is just to follow up with our meeting of September 28, 2015. It is my understanding that the Sanitation District will open an account where it will be listed as receiver for Bullitt Utilities, Inc. As monies are deposited into this account you will pay eighty percent (80%) from the monies received on a monthly basis pursuant to your current contract. Any funds above the eighty percent (80%) that are the appropriate property of the Sanitation District based upon work that it performed during the month will also be paid but by separate invoice. Only if there are funds above the eighty percent (80%) and what the Sanitation District actually expends will there be any distribution to the creditors.

It is our understanding that upon the Public Service Commission issuing a ruling on the surcharge this money will then be collected and also be disbursed pursuant to the contract, eighty percent (80%) to the Sanitation District and the remainder to the current expenses not contained within that eighty percent (80%).

We also discussed that in the near future it would be our opinion that the Sanitation District would seek the grant of authority to file a bankruptcy on behalf of Bullitt Utilities, Inc., so that approximately 3.4 million dollars of liabilities would be extinguished. It is our belief that at the end of the receivership which normally is twelve months (12) or sooner perhaps, these customers will become the customers of the Sanitation District and it is not your intent to be encumbered with these liabilities.

In the short future, while you may wish to equalize the rates that are being paid by Bullitt Utilities, Inc.'s customers, we cannot do so until such time as the Public Service Commission has ruled on a surcharge and thereafter you may petition the Franklin Circuit Court for this authority if not granted by permission from the Public Service Commission.

Please keep an ongoing record of expenses and disbursements as we would like to see at no less than a quarterly time frame, that all expenses and distributions be reported to the Franklin Circuit Court as well as the Public Service Commission and if requested, to the Division of Water and Environmental.

We also discussed the Sanitation District retaining its private counsel because of its recent grant of a rate increase, and that it may be able to do so. I spoke again with Scott Stutler, and he indicated that he would meet with you if you wish to discuss this. Mr. Stutler was ill on Monday, or he would have been at this meeting and it could have been discussed at that time.

BULLITT COUNTY COURTHOUSE, 300 SOUTH BUCKMAN STREET, P.O. BOX 1446, SHEPHERDSVILLE,
KY 40165

Child Support Division

Jeff England

Criminal Division

Doug McCann
Nick Raley
Joshua Bolus

Civil Division

Rob Flaherty
Amanda Spalding


Juvenile Division

Scott Stutler

In the interim should you need anything specific from this office, please contact either myself or Mr. Robert Flaherty at the same phone number.

Also be advised that I will attend the meeting on Thursday evening at 7:00 p.m. which was called by the County Judge and which is for the purposes of the citizens of the Marvin Avenue project to express either their desire to be included or excluded from this project. I am advised that the Bullitt County Health Department will have a representative available. I do not think that this meeting will take long as this should be a simple yes they wish to be included or no they do not. I will take names of anyone who indicates that they are wishing to be included and get these to you as soon as possible.

Yours truly,


JOHN W. WOOLDRIDGE
BULLITT COUNTY ATTORNEY
JWW/jh

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