



Kentucky Rural Water Association

Helping water and wastewater utilities help themselves

November 7, 2017

RECEIVED

NOV 14 2017

PUBLIC SERVICE
COMMISSION

Ms. Gwen R. Pinson, Executive Director
Public Service Commission
P. O. Box 615
Frankfort, KY 40602-0615

Dear Ms. Pinson:

On October 31, 2017, Kentucky Rural Water Association, along with co-sponsor Stoll Keenon Ogden, held a seminar entitled **Utility Leadership Institute - 2017 Water Law Series**. This session was held at the Holiday Inn University Plaza and the Sloan Convention Center in Bowling Green, Kentucky, and offered six (6) hours of continuing education credit.

Enclosed is the agenda, which includes a summary of the topics, and bios for the speakers. One copy of the handouts provided to attendees is also included. This program was submitted to the Kentucky Bar Association and approved for 6.0 CLE credits. A copy of their certificate is included.

With this letter and enclosures, Kentucky Rural Water Association respectfully requests that this training be approved for continuing education credit for water district commissioners as referenced in regulation 807 KAR 5:070. If additional information is needed, please do not hesitate to contact our office.

Sincerely,

Janet Cole
Education Coordinator
j.cole@krwa.org

Enclosures
(Original and 10 packets)

2017 WATER LAW SERIES

October 31, 2017
Holiday Inn University Plaza
Sloan Convention Center
Bowling Green, Kentucky



Morning Agenda

7:45 - 8:25 Registration and Refreshments

8:25 - 8:30 Welcome and Program Overview | Gary Larimore

8:30 - 9:30 Utility Litigation Update | Damon Talley

This presentation reviews recent court decisions involving public and municipal utilities, and discusses actions to mitigate the decisions' impact on utilities. Topics include franchises, wholesale water purchase agreements, escalating CERS pension contributions and unaccounted water loss. Special emphasis will be given to recent decisions addressing a local government's authority to assess a fee on water meters to support 911 emergency services.

9:30 - 9:45 BREAK

9:45 - 10:45 Recent Developments in Utility Regulation, Part I | Gerald Wuetcher

This presentation features a discussion of significant PSC decisions in the last year, including decisions regarding depreciation and employee compensation, as well as possible strategies to assist the PSC in its review of utility applications in this era of increasing budgetary and personnel constraints.

10:45 - 11:00 BREAK

11:00 - Noon 2017 Employment Law Update | Stacy Miller

With a new presidential administration and an active Kentucky legislature, employment law has been dynamic and rapidly evolving in the past year. This presentation will review the recent developments in federal, state, and local employment laws.



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Afternoon Agenda

Noon - 1:00 LUNCH

1:00 - 2:00 Extending Meter Service Life | Mary Ellen Wimberly

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2:00 - 2:15 BREAK

2:15 - 3:15 Recent Developments in Utility Regulation, Part II | Damon Talley & Gerald Wuetcher

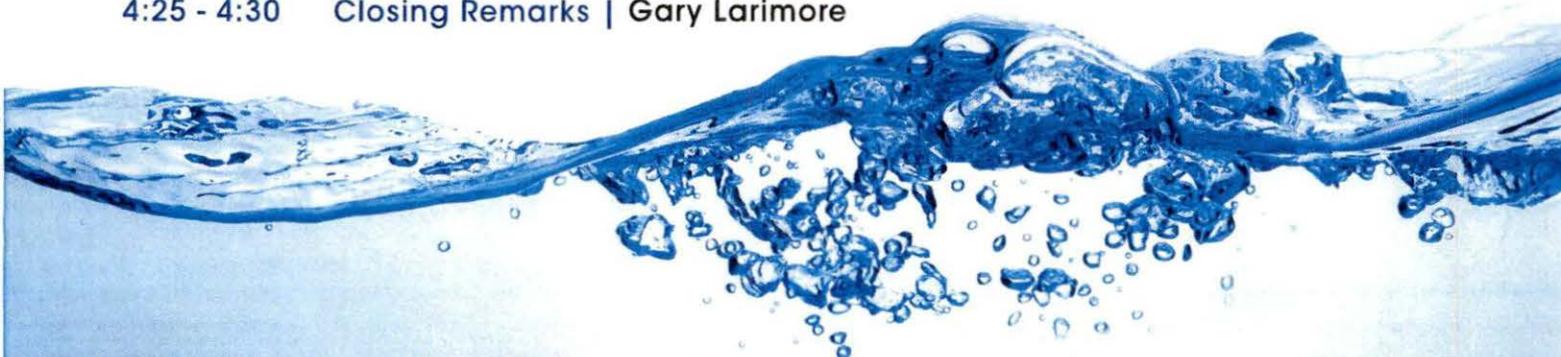
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3:15 - 3:25 BREAK

3:25 - 4:25 Ask the Lawyers | Shawn Rosso Alcott, Frank Hampton Moore, Jr., Damon Talley & Gerald Wuetcher

A panel of utility attorneys will answer audience questions about legal issues that water utilities routinely face. Expected topics include easements, eminent domain, Claims Against Local Government Act, Whistle Blowers Act, Open Meetings Act, Open Records Act, pension and retirement issues, general laws related to Special Purpose Governmental Entities, and PSC regulatory requirements.

4:25 - 4:30 Closing Remarks | Gary Larimore



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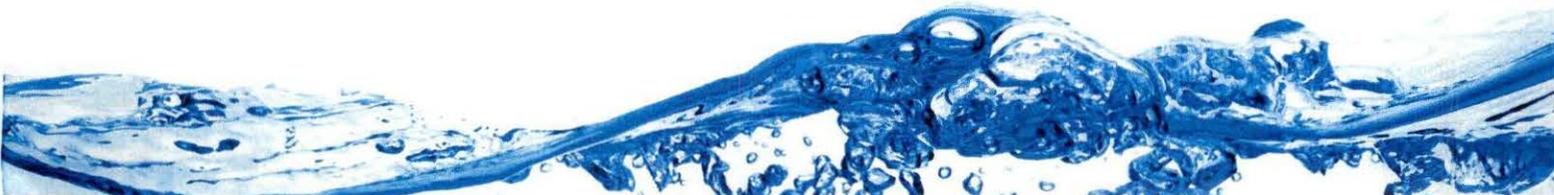
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KY Bar Association, CLE Commission, 514 West Main Street, Frankfort KY 40601-1883
PHONE (502) 564-3795 FAX (502) 564-3225 E-MAIL ckilgore@kybar.org

KENTUCKY CERTIFICATE OF ATTENDANCE
for Approved/Accredited Continuing Legal Education Activity

Activity Identification

Sponsor: Stoll Keenon Ogden - Lexington

Activity Title: KY Rural Water Assoc - Utility Leadership Institute

Date: 10/31/2017 Location: Bowling Green, KY Activity # (REQUIRED): 182027

Format of Activity:

Live (A live program takes place at a specific time and includes the opportunity to interact with or question the instructor. A video replay with a qualified attorney-facilitator, webcasts, and teleconferences are all "live" programs.)

Technological (Technological programs are pre-recorded with no live interaction. A maximum of 6.0 credits may be reported per educational year.)

Approved In-House Activity

This program has been approved by the Kentucky Bar Association for a TOTAL of 6.0 CLE CREDITS.

Of this TOTAL, 0 credits are designated as ETHICS CREDITS.

If this program has not been previously approved by the Kentucky Bar Association, you must file a Form 1 "Application for Accreditation of CLE Activity".

Attorney Certification

PLEASE NOTE: KY CALCULATES CLE CREDITS BASED ON A 60 MINUTE CREDIT HOUR.

By signing below, I certify that I attended the activity described above and am entitled to claim a TOTAL of _____ CLE credits, including _____ ethics credits.

Name (Print)

Signature

Address

Date: _____

KBA ID # (REQUIRED): _____

Credit for Faculty Preparation

Speaker Panel Member Author of Materials

Please claim credit for your actual **participation/teaching/attendance** time above. Claim preparation time below only.

You may claim credit for **preparation**, not to exceed 12.0 CLE credits per education year (divide the actual hours of preparation by 2 to determine CLE credit).

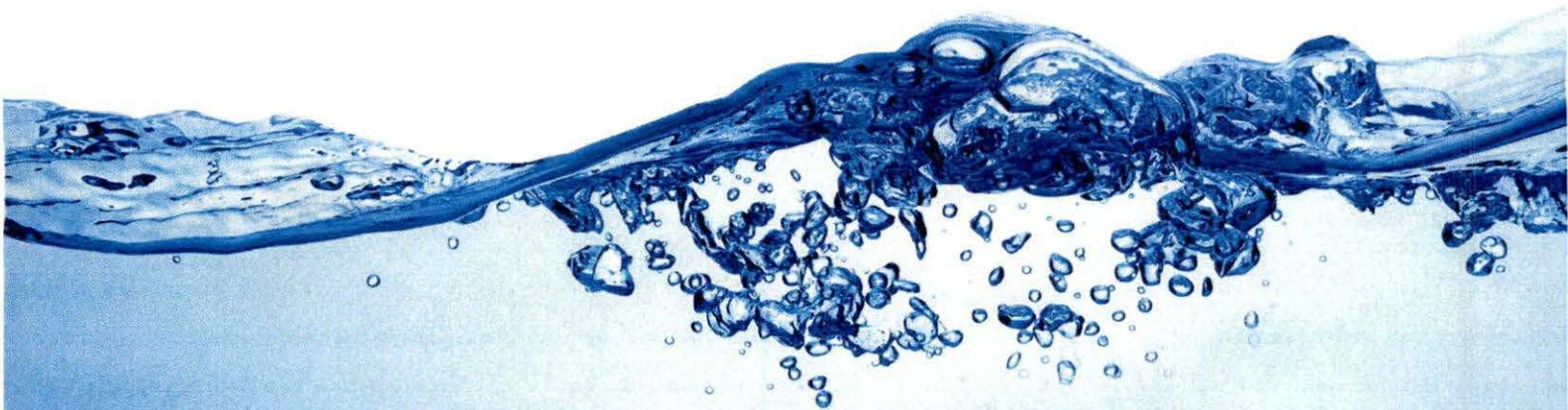
Hours of preparation: _____ ÷ 2 = _____ CLE credits. This total includes _____ ethics credits.



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October 31, 2017

Holiday Inn University Plaza | Sloan Convention Center
1021 Wilkinson Trace
Bowling Green, KY 42103



Presented by:



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Agenda

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About the Speakers

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Utility Litigation Update
Damon Talley

4

**Recent Developments in
Utility Regulation, Part I**
Gerald Wuetcher

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2017 Employment Law Update
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Extending Meter Service Life
Mary Ellen Wimberly

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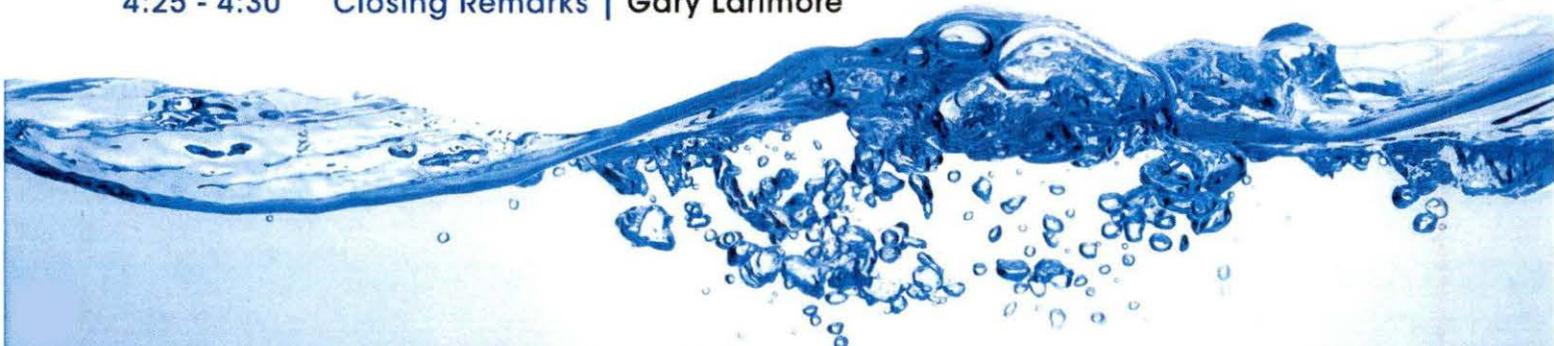
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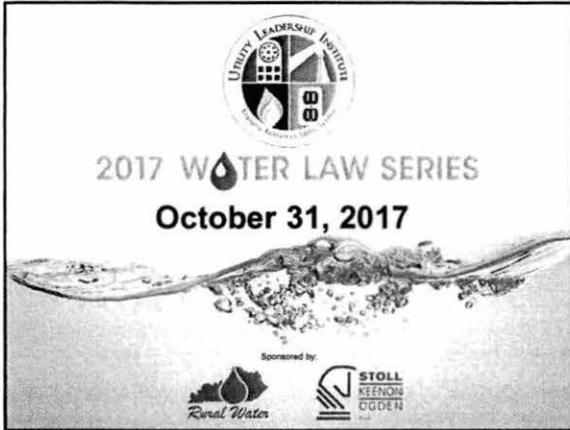


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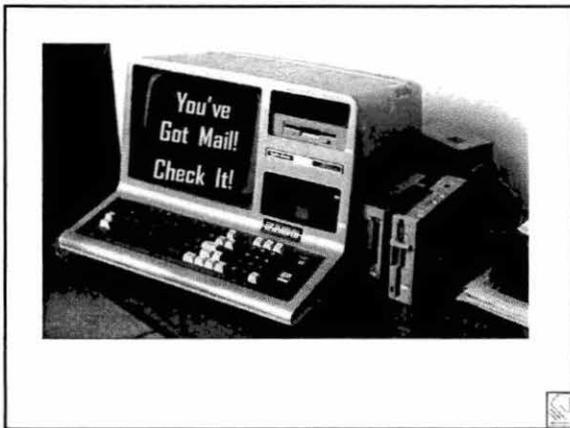




DISCUSSION TOPICS

6. Cases to Watch
7. Skeletons in the Closet
8. 911 Funding Update
9. GASB 68 & NPL
PSC Rate Making





E-Mail Address Regs.

- All PSC Orders Served by E-mail
- Duty to Keep Correct E-mail Address on file with PSC
 - Default Regulatory E-mail Address
- Duty to List E-mail Address in Application & All Other Papers
 - Utility Official
 - Its Attorney

PSC Case No. 2016 - 310

Opened: 9 - 9 - 2016

Utility: Unlucky WD

Type: Show Cause Case

Issue: Ignored PSC Order &
Wrong E-mail Address

Settled: \$500 Fine

E-Mail Address

- Who Is Covered?
 - Water Districts
 - Water Associations
 - Investor Owned Utilities
 - **Municipal Utilities**

Why Municipals?

- Contract Filing
- Tariff Change (Wholesale Rate)
- Protest Supplier's Rate Increase
- Acquiring Assets of Another Utility
- Avoid Delays





Default Regulatory E-mail Address

- Send E-mail to PSC
 - psc.reports@ky.gov
- Send Letter to PSC
 - Ms. Gwen R. Pinson
Executive Director



Franchises and Contracts

Franchise

- Definition
 - Private
 - Rights granted by company to individual or business to sell a product
 - Examples

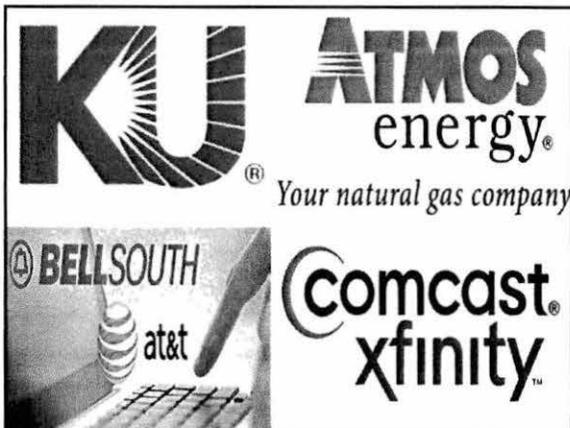


Franchise

▪ Definition

➤ Government

- Privilege granted by government to utility to provide specific utility service
- Permission to erect facilities over & under streets, alleys, & sidewalks
- Fee: 3%
- Examples



Livingston County Case

Ledbetter W.D.

vs.

Crittenden-Livingston WD

Circuit Court

Case No. 2015-CI-00079

Opinion Rendered: 1-25-17

Status: On Appeal

Franchise Case - Holding
40-year
Water Supply Contract
Between 2 Water Districts
Invalid

- Why? Contract = Franchise
- Over 20 Years
- Basis: Kentucky Constitution Section 164





Franchise Case

Crittenden - Livingston WD
vs.

Ledbetter WD

Court of Appeals

Case No. 2017-CA-000578

Briefs Filed: 7-31-17 & 9-21-17

Amicus Brief: 8-11-17

Status: Pending



Ky. Constitution Section 164

No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding **twenty years**. Before granting such franchise or privilege for a term of years, such municipality shall first, after due advertisement, receive bids therefor publicly, and award the same to the highest and best bidder; but it shall have the right to reject any or all bids.

Why?

- 340 Water Utilities
 - 169 WTPs
 - 50% Buy Water
 - Need Water Supply Contract
 - Long Term
- . . .

How Long Is Long Term?

- Lender
 - RD: 40 years
 - KIA: 20 or 30 years
 - Bonds: Length of Bonds

Significance

- If Franchise . . . 20 Year Limit
 - Can't Borrow \$ from RD
 - Other Sources – Only if < 20 years
 - KIA
 - Bonds
 - KRWFC

Legal Analysis

- Does Water District Have Franchising Authority?
 - Constitution: **NO**
 - Judge: **YES**
 - Damon: **NO**

Circuit Judge's Rationale

- Sovereign Power Franchise
- Water District is Sovereign Power
- Water District Franchise
- Problem
 - Ignored Wording of Constitution

Legal Analysis

- Is Water Purchase Agreement a Franchise?
 - Constitution: Silent
 - Case Law: Silent
 - AG Opinion: Yes 1981
 - Judge: Yes
 - Damon: No

Circuit Judge's Rationale

- "The court concludes that the Water Purchase Contract is in fact a franchise . . ."
- Conclusion
- No Explanation

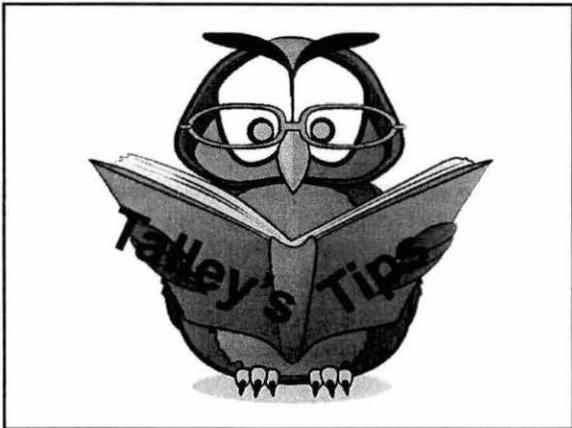
KRWA's Role

- Filed Amicus Brief
 - "Friend" of Court
- Protect Validity of Contracts
- Protect Ability to Obtain \$

What's Next?

- All Briefs Filed
- Oral Arguments ? ? ?
- C/A Decision ? ? ?
- Ky. Supreme Court ? ? ?





Your Role

- Ruling Is Limited to Livingston County . . . for Now
- Don't Change Behavior . . . for Now
- Stay Tuned
- Alert KRWA



**Prevailing
Wages**



**Prevailing
Wages**

Prevailing Wages

- State PW Repealed
 - HB 3
 - When? 1-9-2017
- Federal PW
 - Davis - Bacon Act



Old Law

- State PW Triggered By:
 - Public Works Project
 - Public Authority and
 - Over \$250,000
- Funding Source Immaterial



Davis - Bacon Wages

- DB Triggered By:
 - Public Works Project
 - Public Authority and
 - **Funding Source**



Davis - Bacon Wages ?

Funding Source	Yes	No
Reserve Funds		✓
RD		✓
KIA (Under Review)	✓	
CDBG	✓	
ARC	✓	
EDA	✓	

Davis - Bacon Wages ?

Funding Source	Yes	No
Tax Exempt Bonds		✓
KRWFC		✓
KLC		✓
KACo		✓
Multiple Sources	?	?





Davis - Bacon Wages

- Multiple Funding Sources
 - Does **Any** Funding Source Require DB Wages?
 - If Yes . . . Then Entire Project Requires DB Wages



Pension Expense



Pension Expense

- CERS
- Letter from State Budget Director
 - Revised Assumptions
 - Contribution Rate
 - FYE 6-30-18 19%
 - FYE 6-30-19 29%
- Actual Rates: December 2017

Pension Expense

- 67 of 112 Water Districts
- 60% of Water Districts
- Increase:
 - Total: \$3,912,147
 - Average: \$ 58,390
 - Median: \$ 32,183

Pension Expense

	Utility (Water Districts)	Increased Pension Expense	Gallons Sold (000)	\$ Per 1,000 Gallons
1	East Clark	\$ 23,681	110,000	\$ 0.22
2	Farmdale	\$ 12,857	151,113	0.09
3	Hardin # 2	\$ 307,326	2,102,525	0.15
4	Henderson	\$ 39,694	337,801	0.12
5	LaRue	\$ 32,619	162,477	0.20

Pension Expense				
	Utility (Water Districts)	Increased Pension Expense	Gallons Sold (000)	\$ Per 1,000 Gallons
6	Montgomery	\$ 6,117	34,089	\$ 0.18
7	Northern Ky.	\$ 762,756	7,810,113	0.10
8	North Marshall	\$ 43,829	397,160	0.11
9	North Nelson	\$ 20,185	261,887	0.08
10	Ohio County	\$ 78,113	475,182	0.16

Pension Expense				
	Utility (Water Districts)	Increased Pension Expense	Gallons Sold (000)	\$ Per 1,000 Gallons
11	Oldham Co.	\$ 82,578	1,286,711	\$ 0.06
12	So. Madison	\$ 32,462	263,225	0.12
13	Webster Co.	\$ 45,237	278,268	0.16
14				
15				

Options	
▪ Absorb	
▪ Pass Through to Customers	
▪ Rate Increase	
➤ PSC	
➤ City Council	
▪ Change Law	

KRS 278.015

Purchased

Water

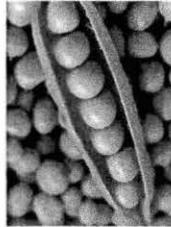
Adjustment

Law Change

Pension

Expense

Adjustment



P E A

- Base Year: 2017
- Increased Pension Expense
- Divide by Gallons Sold
- Per 1,000 Gallons Adjustment
- Line Item on Bill

Law Changes

- Your Thoughts
- Convince
 - KRWA Legislative Committee
 - KRWA Board
 - Legislators



Municipal Utilities

- Convince City Council
- Ordinance
 - Enact Once
 - Automatic **PEA** Annually



Borrowing



KRS 278.300(1)

No utility shall issue any securities or evidences of indebtedness . . . until it has been authorized to do so by order of the Commission.



Practical Effect

- Must Obtain PSC Approval Before Incurring Long-term Debt (Over 2 Years)

- Exception:
 - 2 Years or Less
 - 2 Renewals
(3 X 2 = 6 Years)





Violation

Show Cause Case

Method of Resolution

- Historically . . .
 - Acknowledge Mistake
 - Settle Out of Court . . . Very Quietly
 - Go to Training
 - Pay Small Fine
 - Stay Out of Trouble



Range of Outcomes

- No Show Cause Case Opened
- \$100 Fine (Suspended)
- Go to PSC Training
- \$250 Fine (Suspended)
- More Training (Manager Also)

...

Range of Outcomes

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Range of Outcomes (continued)

- ~~X~~ \$500 Fine (Sometimes Suspended)
- ~~X~~ \$500 Fine & Much More Training
- No More Settlements
- Public Hearing & Then Fined (Suspended)

Who Is Affected?

- Utility
- Current Commissioners
- Former Commissioners
- Manager
- Attorney
- Lender ???

Show Cause Case # 1

Case No. 2016 - 338
Opened: 10 - 11 - 2016
Closed: 02 - 23 - 2017
Issue: KRS 278.300
Hearing: 12 - 13 - 2016

Timeline - Bond Refinancing

05 - 13 - 2013 Board Adopts Resolution
Borrow \$1,530,000
12 - 17 - 2014 PSC Application Filed
Borrow \$1,485,000
01 - 05 - 2015 PSC Order Issued
02 - 05 - 2015 KRWFC Bond Sale
02 - 19 - 2015 Loan Closing
Borrow \$2,780,000

Timeline

03 - 31 - 2015	Board Lawyer Filed Docs
12 - 28 - 2015	ARF Application Filed
04 - 15 - 2016	Staff Report Issued
10 - 11 - 2016	Show Cause Order
11 - 16 - 2016	Informal Conference
12 - 13 - 2016	Formal Hearing
02 - 23 - 2017	Order

Facts

Total Savings:	\$478,376
NPV Savings:	\$326,209
Amount Approved:	\$1,485,000 + 10%
Amount Borrowed:	\$2,780,000

Show Cause Case # 1

- Ruling:
 - \$500 Fine (Suspended)
 - Rejected Advice of Counsel Argument
 - Lawyer on Hook

Show Cause Case # 1

- Process Is Noteworthy:
 - Begged to Settle
 - PSC Said No
- Formal Hearing

Show Cause Case # 2

PSC Case No. 2017-176

Order: 8-18-2017
Utility: Water District
Type: ARF Case
Holding: Hold Hearing
Why? Violated 278.300



Show Cause Case # 2

Staff Report: 8-9-2017

Recommended: 24% Rates
\$360,000 Annual
\$30,000 per Month
3 Loans - Local Bank

Hearing: 11-1-17



Hearing on 11-1-17

- Purposes:
 - Line Loss - 33%
 - Violation of 278.300
 - Purpose of Loans
 - Fringe Benefits

Hearing on 11-1-17

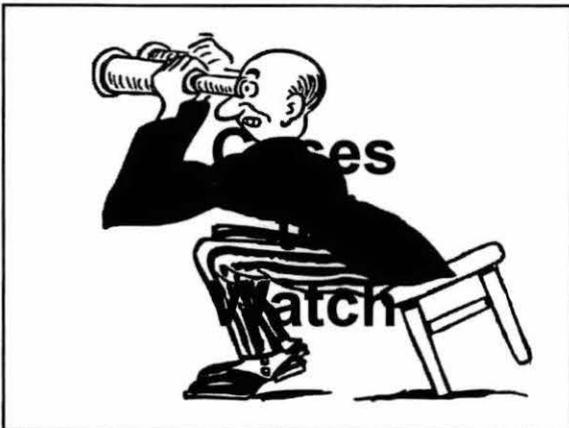
- Who Must Attend?
 - Each Commissioner
 - Office Manager
 - Distribution System Manager

**Talley's
Take
Aways**

PSC Commissioners:

- Take Their Jobs Seriously
- Hands On
- Love Hearings
- Promote Transparency
- Oversight Means Oversight





PSC Case No. 2016-432

Filed: 12-29-2016
Utility: Hardin Co. WD No. 2
Type: Declaratory Order
Issue: 15 Year Meters
Sample Testing
Decided: ? ? ? ? ?



PSC Case No. 2017-070

Staff
Report: 6-30-2017
Utility: Monroe Co. WD
Type: ARF
Issue: Depreciation
Fringe Benefits

PSC Case No. 2017-246

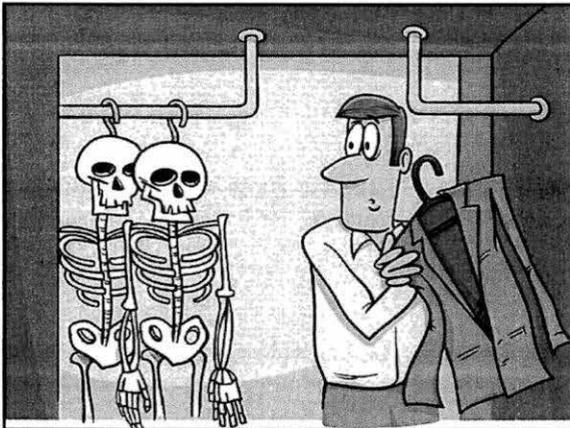
Filed: 6-30-2017
Utility: McCreary Co. WD
Type: Deviation
Issue: Daily Inspection of
Grinder Pumps

PSC Case No. 2016-394

Filed: 11-18-2016
Utility: KAW
Type: Deviation
Issue: Annual Inspection of
Meters & Valves
Hearing: 10-31-2017

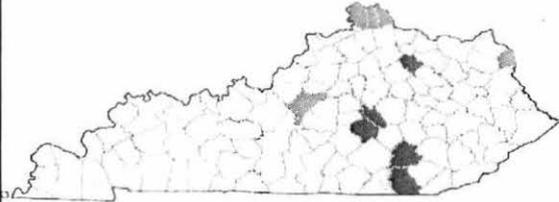
PSC Case No. 2016-427

Filed: 12-08-2016
Utility: Northern KY WD
Type: Deviation
Issue: Annual Inspection of
Meters & Valves

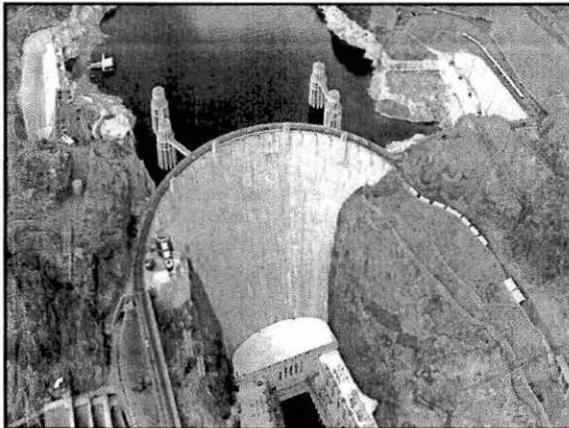


**911
Funding
Update**

911 Alternate Funding

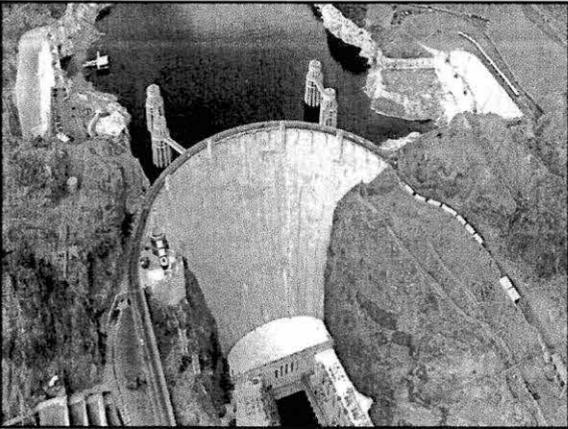


Red - Fee on Water
Green - Parcel Fee
Yellow - Under Consideration





OK
To
Put 911 Fee
On
Water Meters







Garrard County Case
City of Lancaster, et al
vs.
Garrard County, Kentucky
Court of Appeals
Case No. 2013-CA-000716-MR
Opinion Rendered: 7-03-14
Opinion Vacated: 2-18-16
New Opinion: 8-11-17

Campbell County Case
Greater Cincinnati / Northern Ky.
Apartment Assoc., Inc., et al
vs.
Campbell Co. Fiscal Court, et al
Supreme Court of Kentucky
479 S.W.3d 603 (Ky. 2015)
Opinion Rendered: 10-29-15
Became Final: 02-18-16

Parcel Fee

- Occupied Residential & Commercial Properties
 - Campbell County (8-17-13)
 - Parcel Fee (Per Unit)
 - \$45.00 per Year
 - Kenton County
 - Per Parcel, Not Per Unit
 - \$60.00 per Year



Parcel Fee

- Campbell County Case
- Ky. SC Rules ... 10-29-15
(Became Final: 2-18-16)
 - Parcel Fee OK
 - Not a "User" Fee
 - Not a "Tax"
 - "Service" Fee



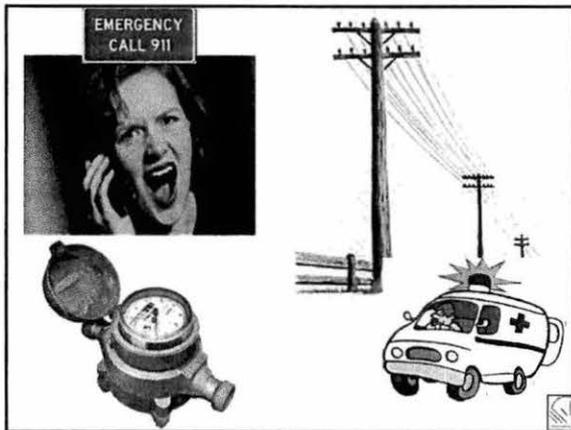
Unresolved Legal Issues

- Does County Have Legal Authority to:
 - Compel City to Collect Fee?
 - Compel WD to Collect Fee?
 - Compel WA to Collect Fee?
 - Compel IOU to Collect Fee?



Unresolved Legal Issues

- Does County Have Legal Authority to:
 - Impose 911 Fee on:
 - City Utility?
 - Water District?
 - Water Association?
 - Investor Owned Utility?



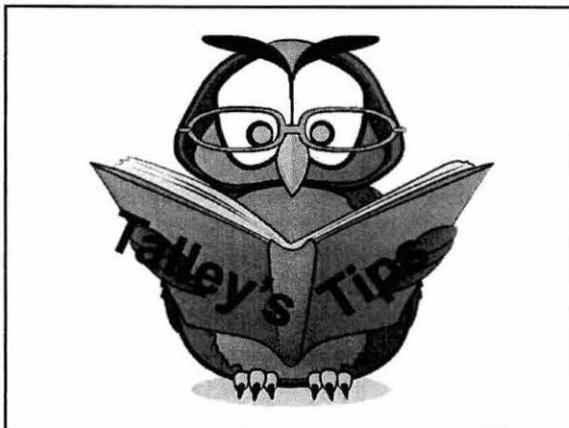
Current Status

- Campbell County – Parcel Fee OK
- Garrard Co. – Water Meter Fee OK
 - But **Wait!!!** Motion for Discretionary Review Filed
 - In Limbo

Your Role

- Prepare for PR Battle
- Stay Informed
- Be Vigilant
- Alert KRWA
- Don't Ignore the Problem

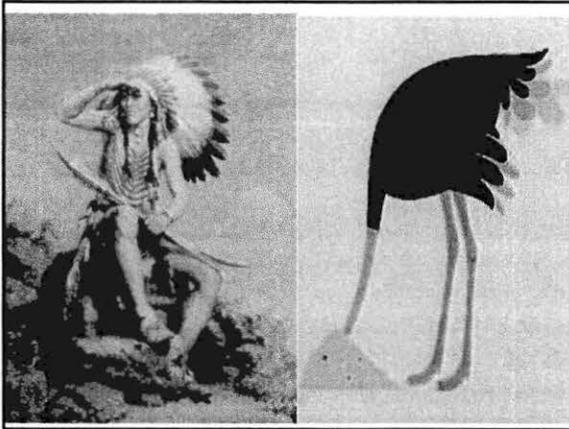




If Stuck With A Fee

- Collection Agreement with County
 - Tax Collector Not Tax Payer
 - Hold Harmless Clause
 - Refunds
 - Legal Fees
- Show As Line Item on Bill
(If PSC Permits)





GASB 68 & NPL PSC Rate Making

- Background GASB 68**
- CERS
 - Net Pension Liability
 - Utility's % of NPL
 - GASB 68
 - Adopted: 2012
 - Effective:
 - Cities FYE 6-30-15
 - WDs FYE 12-31-15

Background GASB 68

- Purpose
 - Financial Statements Reflect Potential Impact of Unfunded Pension Liability
 - Each CERS Employer Reports Its % of NPL
- Impact on Rate Making



PSC Case No. 2016 – 163
Issued: 8-11-16 (Staff Report)
Utility: Marion Co. Water Dist.
Type: ARF Case
Issue: PSC Rate Making
Treatment Under
GASB 68 & NPL



Staff Report

- Thorough Analysis (21 pages)
- Cash Flow Needs
 - Utility's Cash Contribution to CERS
 - Ignores NPL for Rate Making
- Avoids Wide Fluctuations
- No Change – Revenue Requirements



Staff Report

- Balance Sheet Treatment
 - Complicated
 - Creates Regulatory Asset
 - Prevents "Big Hit"
 - Avoids Wild Fluctuations
- PSC Approved: 11-10-2016
- Adopted Staff Report



damon.talley@skofirm.com

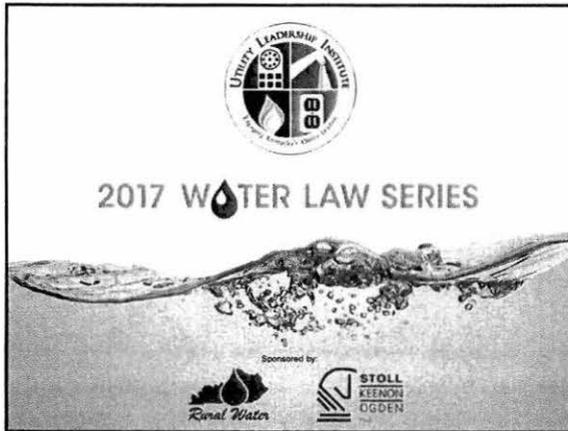
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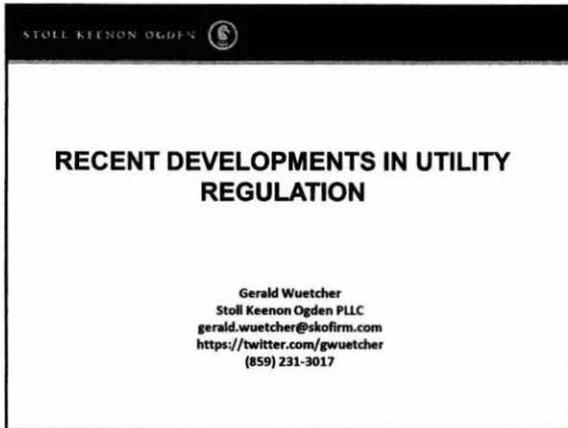
STOLL
KEENON
OGDEN

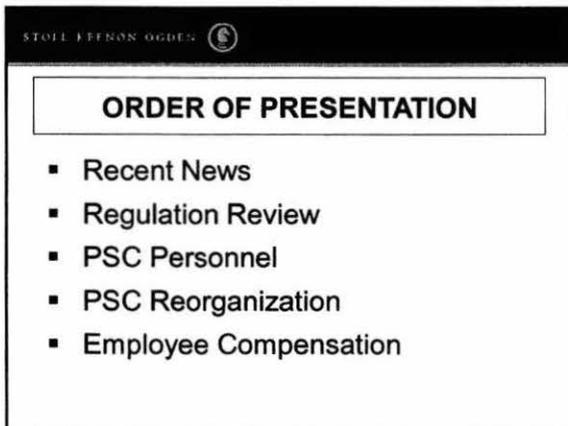


2017 WATER LAW SERIES









ORDER OF PRESENTATION

- Nepotism
- Depreciation
- Certificates of Public Convenience & Necessity
- Use of Attorneys in PSC Proceedings

RECENT NEWS

RECENT NEWS

- Court Affirms Imposing Liability for Renter's H₂O Bills on Landlord
- KAWC Infrastructure Rider Withdrawn
- PSC Meter Lab To Close
- Boiled H₂O Advisory Reporting to PSC Terminated
- PSC Doubles Down on Water Loss

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REGULATION REVIEW

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REGULATORY REVIEW

- 2017 General Assembly enacted HB 50 (Regulatory Sunset Bill)
- Codified at KRS 13A.3102
- An administrative regulation expires after seven (7) years unless certified by promulgating agency
- Regulations promulgated before 7/1/2012 will expire on 7/1/2019

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REGULATORY REVIEW

- To avoid expiration, promulgating agency must :
 - Review regulation to determine if it accords with KRS Chapter13A & current subject matter law
 - Certify by Letter to LRC that Regulation will be amended to comply with current law or can remain in effect without amendment

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REGULATORY REVIEW

- If regulation requires amendment, agency must submit an amended regulation to LRC within 18 months after submitting certification letter
- If amended regulation not timely submitted, it will lapse

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REGULATORY REVIEW

- PSC must review & certify following regulations by 7/1/2019:
 - 807 KAR 5:066 – Water
 - 807 KAR 5:070 – Water District Commissioner Training
 - 807 KAR 5:071 – Sewer
 - 807 KAR 5:090 – System Development Charges
 - 807 KAR 5:095 – Fire Protection for Water Utilities

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PSC PERSONNEL

DEPARTURES

- Jim Gardner (Chair/Vice Chair)
- Daniel Logsden (Commissioner)
- Aaron Greenwell (Deputy Executive Director)
- Ginny Smith (Director, Consumer Services Div.)
- Linda Faulkner (Director, Filings Division)
- Darell Newby (Director, Financial Analysis)
- Brent Kirtley (Manager, Tariffs Branch)

DEPARTURES

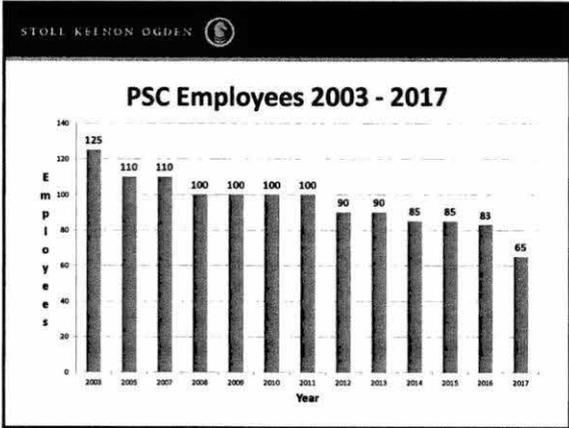
- Mark Rashe (Mgr, Engineering H₂O Branch)
- Scott Lawless (Water & Sewer Branch)
- Jason Penell (Inspections Division)
- David Spenard (Office of General Counsel)

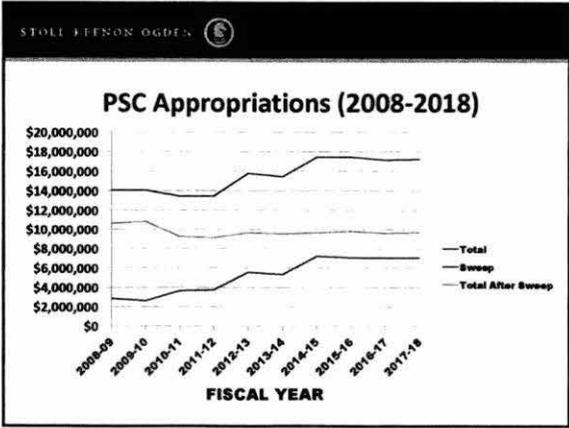
APPOINTMENTS

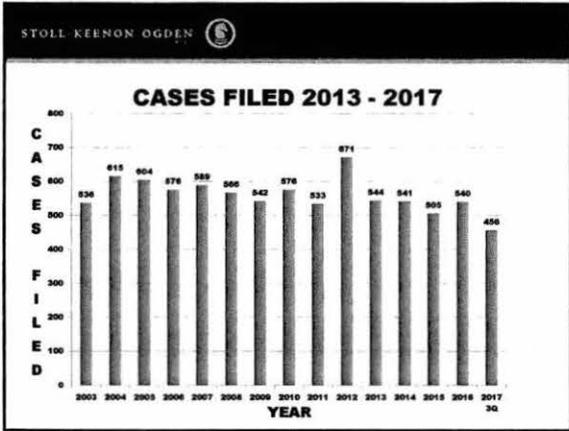
- Michael J. Schmitt - Chair (Term ends 6/30/2019)
- Robert J. Cicero – Vice Chair (Term ends 6/30/2020)
- Talina Mathews – Comm'ner (Term ends 6/30/2021)
- Gwen R. Pinson – Executive Director
- John S. Lyons – Deputy Executive Director
- Mary Beth Purvis – Manager, Water & Sewer Branch, Financial Analysis Division
- Jeb Pinney – Acting General Counsel

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PSC FUNDING & ORGANIZATION







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PSC REORGANIZATION: EXECUTIVE ORDER 2016-832 (11/18/2016)

- Division of Engineering **ABOLISHED**
- Division of Consumer Services **ABOLISHED**
- Division of Filings **ABOLISHED**
- Division of Inspections **CREATED**
- Office of General Counsel **CREATED**
- Division of General Admin **CREATED**

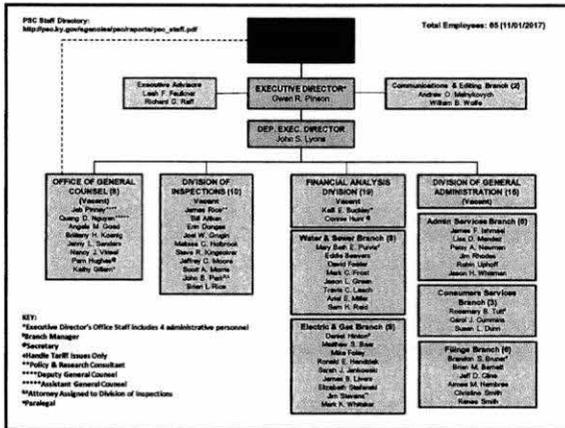
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PSC REORGANIZATION: EXECUTIVE ORDER 2016-832 (11/18/2016)

- Tariff Branch **ABOLISHED** – functions move to Financial Analysis Division
- Annual Reports & Docket Branches **ABOLISHED** – functions moved to Division of General Administration
- Water & Sewer Rate Design Branch and Water Revenue Requirements Branch **MERGED**

CURRENT POINTS OF CONTACT

- Overall: Gwen R. Pinson - (502) 782-2561
John Lyons - (502) 782-2592
- Consumer Complaints: Rosemary Tutt - (502) 782-2561
- Legal: Jeb Pinney - (502) 782-2561
- Water – Financial & Accounting Issues: Mary Beth E. Purvis - (502) 782-2561
- Inspections: John Lyons - (502) 782-2592
- Tariffs: Kelli E. Buckley - (502) 782-2622



ADAPTING TO THE NEW ENVIRONMENT

**ADAPTING TO THE NEW ENVIRONMENT:
Part I**

- Incorporate PSC Review Periods Into Planning Process
- Do not Wait Until Last Minute
- More Comprehensive Application
 - Provide Historical Background
 - Provide Greater Narrative/Testimony of Utility Officials
 - Anticipate Requests for Information/Documents & Include
 - Organize Materials to Ensure Easier Review/Reference

**ADAPTING TO THE NEW ENVIRONMENT:
Part II**

- Greater Preparation
 - Pre-filing conferences with PSC Staff
 - Identify potential issues prior to filing
 - Review Prior PSC Orders/Proceedings
 - Identify/Gather Evidence & Argument to address potential issues
- Strictly Adhere to Filing Checklists
- Request Deviations From Filing Requirements When Necessary

**ADAPTING TO THE NEW ENVIRONMENT:
Part III**

- Contact Potential Intervenors
 - Ascertain Their Positions
 - Explain Your Application/Requested Relief
- Alert PSC Staff to Timing Requirements
- Check Periodically on Status of Proceeding
- Use Electronic Filing Procedures
- Do Not File Application Unless Law Requires

**ADAPTING TO THE NEW ENVIRONMENT:
Part IV**

- Longer Review Times Likely
- More Frequent & Lengthy Requests for Information
- Greater Litigation Expense

**EMPLOYEE
COMPENSATION**

**EMPLOYEE COMPENSATION:
CASE NO. 2015-00312**

- Electric Utility Sought Rate Increase
- Attorney General (AG) raised concerns re: wage & salary increases/fringe benefits
- PSC:
 - Shares AG's concerns
 - No basis in record to justify determination that wages and benefits are not reasonable
 - Notes problems with studies re: wages

**EMPLOYEE COMPENSATION:
CASE NO. 2015-00312**

"[T]he Commission believes that employee compensation and benefits need to be more sufficiently researched and studied. The Commission will begin placing more emphasis on evaluating salary and benefits as they relate to competitiveness in a broad marketplace. **Future rate applications will be required to include a salary and benefits survey that is not limited exclusively to electric cooperatives, electric utilities, or other regulated utility companies. The study must include local wage and benefit information for the geographic area where the utility operates and must include state data where available.**"

Order of 9/15/2016 at 15

**EMPLOYEE COMPENSATION:
CASE NO. 2016-00054**

- Water District Sought Rate Increase
- PSC Staff challenges annual increases for select employees who receive percentage increases greater than other employees
- PSC **disallowed** higher increases:
"The annual wage rate increase for all employees should be comparable **unless there is evidence demonstrating a reasonable basis for a different increase amount**, such as when an employee receives a promotion for accepting additional responsibilities."

**EMPLOYEE COMPENSATION:
CASE NO. 2016-00054**

- AG challenged wage expense related to annual wage increase of 3% for all employees & health, life & vision insurance (at no cost)
- PSC rejected challenges and found wage increase & fringe benefit package reasonable
- PSC subsequently granted rehearing to consider AG's objections but eventually affirmed its decision

**EMPLOYEE COMPENSATION:
SUPPORTING SALARY/WAGE LEVELS**

- PSC closely reviewing Wage/Salary levels
- Applications for Rate Adjustment should support any adjustment in test period expense
- Comparison with other utilities
 - KRWA Salary Survey
 - Kentucky League of Cities' Wage and Salary Survey
 - AWWA Wage/Salary Survey
 - Bureau of Labor Statistics
 - PSC Annual Reports

**EMPLOYEE COMPENSATION:
SUPPORTING SALARY/WAGE LEVELS**

- When using surveys, ensure appropriate category used
- PSC will closely examine/critique employees in excess of average
- Provide Complete Job Descriptions
- Identify Special Employee Skills & Education
- Emphasize Experience/Longevity w/Utility

**EMPLOYEE COMPENSATION:
SUPPORTING COMPENSATION PACKAGE**

- Support for Wage/Salary Increases
 - Consumer Price Index
 - Bureau of Labor Statistics
 - Employee Performance Evaluations
- Identify factors that affect compensation
 - Utility's Location
 - Local Labor Pool
- Annual Increases In Excess of Cost of Living: PSC expects any increase in excess of cost-of-living to be based upon documented performance

**EMPLOYEE COMPENSATION:
SUPPORTING COMPENSATION PACKAGE**

- Document Wage Decisions
 - Bd Minutes should reflect Bd's reasoning for increases
 - Specific, detailed reasons preferred over general
- Implement Evaluation System to provide better support for selective wage/salary increases
- Avoid across-the-board performance raises

**EMPLOYEE COMPENSATION:
SUPPORTING COMPENSATION PACKAGE**

- If Board is the decision-maker, ensure Board witness can articulate basis for decision
- If competition for local labor is basis for increase, provide supporting info re: local labor market

**EMPLOYEE COMPENSATION:
BONUSES**

- PSC has historically disallowed bonuses
 - Salary adequate
 - Non-recurring
 - Discretionary
- Question of Lawfulness
 - KY Constitution Section 3
 - OAG 62-1
- Consider Implementing Incentive Compensation Policy to Overcome PSC Objections

Commissioners' Salaries/Benefits

- Have Fiscal Court Ordinances re: salary level available for inspection
- Have proof of training attendance if compensation > \$3,600 awarded
- No free or reduced service
- Insurance benefits should not exceed those provided employees
- Why are benefits other than salary needed?

**EMPLOYEE COMPENSATION:
HEALTH INSURANCE**

- PSC reviewing employers' contribution for health insurance cost
- If employer's contribution (%) exceeds national average, PSC **denies recovery** for excess
- PSC directing utilities to establish a policy that requires employees to pay a portion of health & dental insurance

**EMPLOYEE COMPENSATION:
HEALTH INSURANCE**

BLS: Estimate of National Average

Coverage	Average	Private Industry	State & Local Government
Family	68/32	68/32	71/29
Single	81/19	79/21	87/13

**HEALTH INSURANCE COSTS
CASE NO. 2016-00169**

- AG challenges utility's 100% payment of health, life & vision insurance premiums
- PSC finds that employer contributions should be "more in line with other businesses" to reduce expenses"
- PSC: Majority of businesses do not pay 100% of employees' insurance costs
- Expenses should be based upon National Average

**HEALTH INSURANCE COSTS
CASE NO. 2016-00169**

- National Average based on BLS Study
- Limited to salaried Employees
- Union Employees exempted
- PSC **ORDERS** utility to limit to national average percentages its contributions to employee insurance

**HEALTH INSURANCE COSTS
CASE NO. 2016-00365**

- RECC paid for single coverage; employee paid \$149/month for other coverages
- PSC: RECC should limit its contribution to BLS national average employer rate
- PSC: Expects RECC to **establish policy** to limit contribution & require all employees to pay portion of premium
- Portion of health insurance cost disallowed

**HEALTH INSURANCE COSTS
CASE NO. 2016-00325**

- Water District paid 100% of insurance cost
- PSC: WD should exercise financial prudence & reduce expense related to employee benefits **by establishing policy** that requires employees to pay a portion of premiums
- Portion of health insurance cost disallowed
- WD given **no notice** of possible action

**HEALTH INSURANCE COSTS
CASE NO. 2016-00435**

- Water District paid 100% of insurance cost
- PSC: WD should exercise financial prudence & reduce expense related to employee benefits **by establishing policy** that requires employees to pay a portion of premiums
- Portion of health insurance cost disallowed
- WD given **no notice** of possible action

**HEALTH INSURANCE COSTS
CASE NO. 2016-00367**

- RECC paid 100% of insurance cost
- PSC: RECC should exercise financial prudence & reduce expense related to employee benefits **by establishing policy** that requires employees to pay a portion of premiums
- Portion of health insurance cost disallowed

**HEALTH INSURANCE COSTS
CASE NO. 2016-00434**

- RECC requires non-union employees to pay 8%, union employees to pay 10% of insurance cost
- PSC: RECC should increase efforts to rein in expenses **by establishing policy** that requires employees to pay an **increased percentage** of premium
- Portion of health insurance cost disallowed

**HEALTH INSURANCE COSTS
CASE NO. 2017-00070**

- WD paid 100% of insurance cost
- PSC Staff: Determination of reasonableness of cost should be based upon total compensation paid to employees; WD's overall cost lower than others and should be considered reasonable
- PSC has indicated recommendation will be rejected

**HEALTH INSURANCE COSTS
DISALLOWED IN 2017**

- Last 7 WD rate cases:
 - Rule Applied/Costs disallowed – 5
 - PSC Hearing on Costs – 1
 - Allowed – 1
 - No health insurance costs – 1
- PSC Rule on Health Insurance Costs???

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PROBLEMS WITH PSC APPROACH

- Due Process Concerns
 - No notice to utilities
 - Utility has no opportunity to confront BLS “National Average” Statistics
- KRS Chapter 13A: PSC adopts a rule without following proper procedure
- PSC Assumption: Utility Industry payment of insurance costs is “skewed” – utilities pay 100% of costs (BLS does not support assumption that utilities pay 100%)

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PROBLEMS WITH PSC APPROACH

- Improper Use of BLS Statistics
 - No recognition of Distinct Local Gov’t Data
 - Refusal to Use “Utilities Information”
 - Never Finds Current Compensation Costs Unreasonable
- PSC refuses to consider:
 - Insurance Policies of Utility
 - Local Labor Markets
 - Utilities’ Efforts to contain/reduce health insurance costs
 - Reputable/recognized studies on issue

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RESPONSES TO PSC APPROACH

- Use Good Procurement Practices
 - Request Bids/Seek cost estimates from various suppliers annually
 - Document/Demonstrate Cost was reasonable
- Compare **Total Compensation Cost** vs. Other Regulated Utilities/Municipal Utilities
- Introduce Evidence of Local Labor Markets
- Emphasis Unique Nature of Workforce

RESPONSES TO PSC APPROACH

- Consider differences between the quality of WD's insurance coverage & National Average Policy (e.g. deductibles)
- Challenge Use of National Average – Use Government Category
- Use a different study for National Average (e.g., Kaiser Family Foundation)
- Assert Due Process Concerns

NEPOTISM

NEPOTISM

- Greater PSC Interest in Utilities' Nepotism Policies
 - Standard Request in RECC rate cases
 - Statement of Related Transactions Required in Most H₂O Rate Cases
- Case No. 2016-00169:
 - PSC critical of RECC for hiring CEO's relatives
 - Ordered that RECC's exception to Nepotism Policy be eliminated

PSC ON NEPOTISM

"[I]t is bad business practice to [employ] . . . relatives, especially relatives of management or board members, because there is a natural tendency to favor relatives."

Case No. 2016-00169, Order of 2/6/2017 at 25

NEPOTISM

- Review County Ethics Ordinance Re: Nepotism
- Comply with Ordinance
- Consider Supplementing If Ordinance is Inadequate
- Board Members/Management Have Duty to Disclose (ARF Form 3)
- Annual Review/Refresher
- Fully document/explain any exceptions in Board Minutes

DEPRECIATION

DEPRECIATION

"[D]epreciation is the loss, not restored by current maintenance, which is due to all the factors causing the ultimate retirement of the property. These factors embrace wear and tear, decay, inadequacy, and obsolescence. **Annual depreciation** is the loss which takes place in a year. In determining reasonable rates for supplying public service, it is proper to include . . . an allowance for consumption of capital . . ."

Lindheimer v. Illinois Bell Tele. Co., 292 U.S. 151, 167 (1934)

DEPRECIATION

- Depreciation Permits Recovery of the Cost of A Capital Asset
- Annual Depreciation Expense = $(\text{Asset Cost} - \text{Salvage Value}) \div \text{Useful Life (years)}$
- Two Critical Components
 - Asset Cost
 - Useful Life

USEFUL LIFE: EFFECT ON REVENUE REQUIREMENT

Assume: \$10 Million Water Mains

Useful Life (Years)	Annual Depreciation Expense
25	\$400,000
30	\$333,334
40	\$250,000
50	\$200,000
62.5	\$160,000
75	\$133,334

EFFECT OF USEFUL LIFE ON REVENUE REQUIREMENT

- Increases/Decreases Revenue Requirement
- Erroneous Useful Life creates
 - Generational Inequities (Earlier Generation pays for Asset that a Later Generation Uses)
 - Inadequate Revenue for Infrastructure Replacement
 - "Money Left on Table" That Utility Never Recovers (PSC Staff)

METHODS FOR DETERMINING ASSET'S USEFUL LIFE

- Engineering Estimate/Judgment
- Depreciation Study
- NARUC's *Depreciation Practices for Small Water Utilities*

DEPRECIATION STUDIES: GENERALLY

- Involves an analysis of past performance and engineering estimates of future
- Requires detailed historical records (30 Years) re: plant additions and retirements
- Survivor Curves plotted
- Supplemented with information from management and operating personnel re: current plant operations & practices
- Interpretation

PSC RE: USE OF DEPRECIATION STUDIES FOR SMALLER UTILITIES

Detailed property records specific to historic plant additions, plant retirements, and salvage practices are required to complete a depreciation study. Generally, "small" water utilities, such as Pendleton District, do not maintain property records with enough detail to properly complete a formal study. Furthermore, even if adequate records were maintained, "small" utilities do not have the financial resources to fund a formal study.

Case No. 2012-00412, PSC Staff Report at 9-10.

Depreciation Practices For Small Utilities

- National Association of Regulatory Utility Commissioners (NARUC) Publication (Aug. 15, 1979)
- Intended to address the needs of regulatory commissions to establish realistic depreciation rates for small H₂O utilities
- Provided in table format a range of average service lives then in use by H₂O utilities throughout the US for H₂O facilities designed & installed & maintained in accordance with good H₂O works practice

Depreciation Practices For Small Utilities

"The commission has previously used . . . [the NARUC] survey when establishing the appropriate depreciable lives for water utilities such as Rattlesnake Ridge when historic property records are not maintained in the manner necessary to perform a formal depreciation study or the utility does not have the financial resources to fund a formal study. Application of the NARUC Study is appropriate in this instance."

Case No. 2013-00338, Order of 02/07/2014 at 4.

Depreciation Practices For Small Utilities

“Since the depreciable lives in the NARUC Study are similar to those of an average utility, the NARUC Study may be used to evaluate the reasonableness of the depreciation practices of water districts and water associations without regard to the number of customers they serve or the amount of annual revenues and plant investment they report.”

Case No. 2016-00163, Order of 11/10/2016 at 17.

Depreciation Practices For Small Utilities

“Although significant time has elapsed since its issuance, the NARUC Study presents a conservative estimate of the anticipated useful life of water mains that are constructed of either iron, PVC, galvanized steel, or concrete.”

Case No. 2016-00163, Order of 11/10/2016 at 17.

PSC TREATMENT OF USEFUL LIVES

- Recent Focus on Useful Lives (Mains/Meters)
- PSC Staff Routinely Recommending Changes To Conform to NARUC Guide

Year	Total Cases	Revised Useful Lives
2012	8	5
2013	4	3
2014	6	5
2015	8	7
2016	9	9
2017	3	3

PSC STAFF APPROACH

- Prior to Nov. 2016:
 - Utility's Useful lives are within NARUC Range – No Change
 - Useful Lives Outside NARUC Range – Revise to Mid-Range
- Since Nov. 2016: In absence of evidence to support specific useful life, the NARUC mid-point will be used

PSC STAFF APPROACH

- Factors Considered:
 - Asset's construction materials
 - Asset's condition
 - Other Factors
- PSC Non-Engineering Staff may exercise "engineering judgment"

RESPONSE TO STAFF RECOMMENDATION

- Recommendation contested twice
- Why?
 - Contest would delay rate increase
 - Cost of contesting
 - Surprise
 - Limited time to respond/Lack of expertise
 - Limited benefit: Staff recommended rate increase near requested amount

PSC DECISIONS RE: DEPRECIATION

- Utility bears Burden of Proof to Demonstrate Why Its Current Useful Life Is Appropriate
- In absence of evidence to the contrary, NARUC Guide mid-point will be used
- PSC has not required PSC Staff proposals to be supported by engineering/technical evidence when maximum range recommended
- Staff Recommendations adopted in **ALL** Cases
- Adopted for **Ratemaking & Accounting** Purposes

IMPACT OF DISALLOWANCE

Case No.	Disallowance	Requested Increase	Percentage
2016-00377	\$ 88,020	\$ 151,676	58.03%
2016-00265	\$ 31,175	\$ 161,422	19.31%
2016-00177	\$ 48,822	\$ 118,913	41.06%
2016-00163	\$ 66,141	\$ 324,726	20.37%
2016-00068	\$ 93,784	\$ 165,260	56.75%
2016-00054	\$ 167,568	\$ 374,168	44.78%
2015-00428	\$ 41,123	\$ 701,615	5.86%
2015-00341	\$ 88,792	\$ 486,222	18.26%
2015-00331	\$ 22,414	\$ 64,514	34.74%
2015-00308	\$ 3,350	\$ 255,707	1.31%

STEPS TO AVOID OR REDUCE DISALLOWANCE IN RATE CASE: PRE-APPLICATION

- Review Useful Lives – Are they within NARUC range? (Emphasize Mains/Meters)
- Revise for Compliance with Lower Range (Unless basis for variance)
- Estimate effect of Revision on Revenue Requirement at Mid-Point & Higher Range
- If Effects of Mid-Point/Higher Range Revision Significant, Include **Supporting Evidence** for Useful Lives in Application

STEPS TO AVOID OR REDUCE DISALLOWANCE IN RATE CASE: PRE-APPLICATION

- Review Asset Management Plan/Water Main Replacement Plan
- No Plan:
 - Develop plan
 - Emphasize replacement of water mains near the end of useful lives

TYPES OF SUPPORTING EVIDENCE

- Past PSC Treatment of Depreciation Expense
- Depreciation Study
 - Adequate Records?
 - Potential Cost
- Engineer Testimony
 - Sworn Affidavit
 - How committed is your Engineer?

ENGINEER AFFIDAVIT CONTENTS: PART I

- Education Background
- Professional Licenses/Memberships
- General Experience in Water Industry
- Description of Utility Facilities/Past History
- Experience with the Utility's Operations & Facilities
- Alternative to Experience with Utility
 - > Review of Utility Records
 - > Interviews of Prior Engineering Firms & Utility Personnel
 - > Investigation of Construction Firms Performing Work

**ENGINEER AFFIDAVIT CONTENTS:
PART II**

- Personal Experience with Contractors/Materials in work for other utilities
- Industry Experience with Materials/Facilities
- Opinion re: useful lives
- Reasoning for Opinion

**STEPS TO AVOID OR REDUCE
DISALLOWANCE: STAFF SITE INSPECTION**

- Exercise Care with Staff Inquiries re: utility facilities
- Utility should designate one person to answer inquiries – (Engineer)
- Request that inquiries be in writing & respond in writing
- If Interview, conduct in presence of attorney or witness/record interview

**STEPS TO AVOID OR REDUCE
DISALLOWANCE: AFTER THE STAFF REPORT**

- Review Staff Report
 - Is Disallowance of Depreciation Expense Recommended?
 - Does recommended Revenue Requirement (RR) meet utility's needs?
 - What is the effect on RR if utility's proposed depreciation expense level accepted?
 - If acceptance of proposed depreciation expense level would generate higher RR than requested, can utility responsibly use the additional funds?

**STEPS TO AVOID OR REDUCE DISALLOWANCE:
AFTER THE STAFF REPORT – RATES ACCEPTABLE**

- **Conditional Waiver/Acceptance**
 - Waive all rights & Accept Recommended **RR** and **rates** on condition PSC addresses only those 2 issues
 - No PSC ruling on other Staff recommendations
 - Still Note Objections to Report/Contested Issues
- **Alternative Request for Relief**
 - Full Discovery including depositions
 - Hearing
 - Separation/Isolation of Assigned Staff

**STEPS TO AVOID OR REDUCE DISALLOWANCE:
AFTER THE STAFF REPORT - RATES UNACCEPTABLE**

- **Note Objections/Contested Issues**
- **Contested Issues (Depreciation Only)**
 - Prior PSC Position on Depreciation in Prior Cases
 - Legal Objections to Use of NARUC Guidelines
 - Policy/Fact Objections to Use or Application of NARUC Guidelines
 - Staff Qualifications to Render Opinion
 - Met Standard (Within Range And Produced Evidence)
- **Procedural Requests (Same as Alternative Relief)**

DEPRECIATION: SUMMARY

- **Major Issue** in Water Utility Rate Cases
- Examine Useful Lives **NOW**/Determine if Valid
- **(BEFORE FILING APPLICATION)** Assess Effects on RR of Major Revisions in Useful Lives
- Address in Application for Rate Adjustment
- Start Maintaining Records to Perform Depreciation Study

DEPRECIATION: SUMMARY

- Consider Conditional Waiver To Avoid Expensive and Unproductive Litigation
- Preparation Costs Can Be **Recovered As Rate Case Expenses**

USE OF ATTORNEYS IN PSC PROCEEDINGS

PSC REGULATIONS RE: ATTORNEYS

- 807 KAR 5:001, §4(3): "Papers" must be signed by party or **attorney**
- 807 KAR 5:001, §4(4): A person shall not file a paper on behalf of another person, or otherwise represent another person, unless the person is an attorney licensed to practice law in Kentucky or an attorney who has complied with SCR 3.030(2)."
- Paper is any "document that [PSC Rules] or the Commission directs or permits a party to file in a case"
- **Bottom Line:** Unless pro se representation, all documents filed in any formal PSC proceeding must be filed by an Attorney

NO ATTORNEY REQUIRED

- Tariff Filings
- Correspondence with PSC Executive Director or other officers (e.g., Response to PSC Staff Inquiry)
- Required Filings outside of Formal Proceedings
 - Annual Reports
 - Regulatory Reports (e.g., Meter Testing)
 - Audit Reports
 - Commissioner Vacancy/Appointments
 - Change/Confirmation of E-mail Address
- Non-recurring Charge Filings
- Request for Staff Opinions

ATTORNEY REQUIRED

- Certificates of Public Convenience and Necessity
- Authorization to Issue Debt/Securities
- Applications for Declaratory Ruling
- PSC Formal Investigations
- Rate Proceedings
 - Suspended Tariff Revisions/Non-Recurring Charges
 - General Rate Adjustments

ATTORNEY REQUIRED

- Request for Deviations

ALTERNATIVE RATE FILINGS

- 807 KAR 5:076, §13
- No Attorney is required to:
 - File application
 - Respond to information requests
 - Appear at conferences
 - Submit Response to Staff Report
- Attorney Required Only for Hearings

ASSESSING NEED FOR ATTORNEY

- How Familiar Is Utility With Process?
- Opposition/Intervenors Expected?
- Complicated Issues?
 - Depreciation
 - Debt Service
 - Rate Design
 - Unusual Expenses
- Likelihood of Hearing?
- Cost – How much can Utility afford?

ASSESSING NEED FOR ATTORNEY

- Purposes for Retaining Lawyer:
 - Identify/Address Potential Ratemaking Problems
 - Avoid Procedural Delays (Delay = \$\$\$)
 - Counterweight to PSC Staff/AG/Other Intervenors
 - Prepare for Hearing
- How much lawyer is needed?
 - Standby/limited oversight
 - Full Participation
- How Familiar is Lawyer with the PSC Process?

ASSESSING NEED FOR ATTORNEY

- Fees:
 - Fixed Fee for Expected Services
 - Fixed Fee/Retainer: Max Fee but Charge Per Hour until Max
 - Contingency: Hourly Rate if Hearing
 - County Attorney (No Fee)
 - Lower Rate/Lesser Involvement in Later Cases
- Fees Recoverable as Rate Case Expense
 - Expenses to Prepare/Review Application
 - Rate Request should include **Maximum Possible Fees**

WHAT CONSTRUCTION PROJECTS REQUIRE PSC APPROVAL?

KRS 278.020(1)

No person, partnership, public or private corporation, or combination thereof shall . . . begin the construction of any plant, equipment, property, or facility for furnishing to the public any of the services enumerated in KRS 278.010, except . . . ordinary extensions of existing systems in the usual course of business, until that person has obtained from the Public Service Commission a certificate that public convenience and necessity require the service or construction.

PROJECTS REQUIRING A CERTIFICATE

- Construction of Any Plant or Facility
- Installation of Equipment on Large Scale (e.g., metering equipment)
- Repurposing of An Existing Facility
- Pre-Construction Contracting
- Acquisition of Facility???

DOES NOT REQUIRE A CERTIFICATE

- Purchase of Building or Land
- Maintenance/Replacement Projects
- Demolition/Destruction of Existing Facility
- Acquisition of Non-Jurisdictional Facilities
- Extensions In the Ordinary Course

EXTENSIONS IN THE ORDINARY COURSE

"A certificate of public convenience and necessity shall not be required for extensions that do not create wasteful duplication of plant, equipment, property or facilities, or conflict with the existing certificates or service of other utilities operating in the same area and under the jurisdiction of the commission that are in the general or contiguous area in which the utility renders service, and that do not involve sufficient capital outlay to materially affect the existing financial condition of the utility involved, or will not result in increased charges to its customers."

807 KAR 5:001, §13(3)

**EXTENSIONS IN THE ORDINARY COURSE:
THE FACTORS**

- No **Wasteful** Duplication of Plant or Facilities
- No Conflict With Existing Certificates or Service of Other Utilities
- Capital Outlay Is Insufficient to **Materially Affect** Existing Financial Condition of Utility
- Will Not Result In **Increased Charges** to Customers

**EXTENSIONS IN THE ORDINARY COURSE:
WASTEFUL DUPLICATION**

- "Excess of Capacity Over Need"
- "Excessive Investment In Relation To Productivity" – Investment's Cost-effectiveness
- Unnecessary Multiplicity of Physical Properties
- Premature Replacement
- **Any Duplication Requires Formal Review**

**EXTENSIONS IN THE ORDINARY COURSE:
MATERIALLY AFFECT**

- Percentage of Net Utility Plant
 - Ordinary if less than 10% (**Abandoned**)
 - 2 Percent Rule (Staff Opinions)
 - 1 Percent Rule – Case No. 2014-00171
- Revenue Neutral – Project generates sufficient revenues to meet expense, then Ordinary
- Debt-Financed (**Conflicting Opinions**)

BUDGET ACT "BRIGHT LINE TEST"

Is a "water main improvement project" limited to construction of water mains only?

- PSC Staff Opinion No. 2017-002
- Water Association proposes to construct water booster station, including 300 feet of 2" water line, & install pressure reducing valve
- PSC Staff: "[T]he project improves existing water lines and qualifies as a 'water line extension or improvement project.'"
- Project involving non-mains may qualify if beneficial effect on existing water mains

METHOD OF ANALYSIS

- Bright Line Test Applicable?
 - Water Main Extension or Improvement?
 - \$500,000 or less?
 - No debt issued & no rate increase required?
- Construction of Facility OR Large Scale Installation of Equipment?
- Purchase?
- Replacement/Maintenance?
- Directly Debt Financed?
- Percentage of Net Utility Plant

WHEN IN DOUBT

- CYA: Private Attorney Opinion Letter
 - Rigorous/Thorough Analysis Essential
- Avoid Requests for Staff Opinion
- DO **NOT** Request A Deviation - Not Permitted Under Statute
- Request Declaratory Order
- File Application for a Certificate

**CONSTRUCTING WITHOUT
CERTIFICATE: CONSEQUENCES**

- Assessment of \$2,500 Penalty To:
 - Utility
 - Utility Management
 - Engineering Firm/Contractors
- Injunctive Relief
- Does Not Affect Rate Recovery

**RURAL DEVELOPMENT FUNDING:
AVOIDING PSC REVIEW**

- KRS 278.023 requires expedited review of RD-funded Projects
- Legislature Assumes RD has adequately reviewed project – Two reviews unnecessary
- Project must be part of Financing Agreement between RD or HUD and WD or WA
- Utility Files Limited Documentation

**RURAL DEVELOPMENT FUNDING:
AVOIDING PSC REVIEW**

- PSC may recommend changes to proposed construction
- PSC must **APPROVE** the project within 30 days of completed application
- Approval includes all actions necessary to implement agreement (rates, financing, certificate)









**2017 Employment Law Update:
An Evolving World**

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**The importance of minding
your P's and Q's ...**

- ❖ How do juries make decisions?
- ❖ Who do juries believe?
- ❖ How do juries think employers make decisions?

3



How do juries make decisions?

Is it more important to see that justice is done than to follow the letter of the law?

- ❖ A. Agree
- ❖ B. Disagree

4



Is it more important to see that justice is done than to follow the letter of the law?

71% Agree

5



Who do juries believe?

In a dispute between an employee and an employer, the average juror tends to believe:

- ❖ A. Employee
- ❖ B. Employer

6



In a dispute between an employee and an employer, the average juror tends to believe:

88% Employee

7



How do juries think employers make decisions?

Many decision-makers' promotion decisions are influenced by an employee's age, sex or race.

- ❖ A. Agree
- ❖ B. Disagree

8



Many decision-makers' promotion decisions are influenced by an employee's age, sex or race.

69% Agree

9



Overview: A Whole New World

- ◆ Status of Obama-era executive actions with new presidential administration
- ◆ GOP Kentucky legislature focus on right to work legislation and repeal of prevailing wage

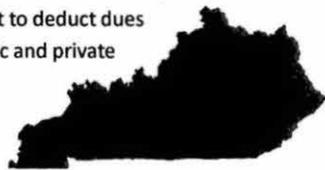


10



Kentucky Legislative Developments

- ◆ Right to Work
 - Cannot compel union membership
 - Written consent to deduct dues
 - Applies to public and private employers



11



Kentucky Legislative Developments

- ◆ Prevailing Wage Repealed
 - Effective January 7, 2017



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Kentucky Legislative Developments

- ◆ "Ban the Box"
 - Applies to Executive Branch state job applications
 - Effective January 7, 2017
 - Some local equivalents apply to private employers

JOB APPLICATION

Have you ever been convicted of a criminal offense?

Ban the BOX

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Notable Kentucky Supreme Court Decision



- ◆ *Kentucky Restaurant Association, et al. v. Louisville-Jefferson County Metro Government*, 501 S.W.3d 425 (Ky. 2016)
 - Minimum wage ordinance ruled invalid and unenforceable
 - Kentucky minimum wage remains \$7.25/hour



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Notable Kentucky Supreme Court Decision



- ◆ *Alph C. Kaufman, Inc., v. Cornerstone Indus. Corp.*, 2017 WL 943972, *1 (Ky. App. Mar. 10, 2017)
 - Enforcement of non-compete agreement signed at commencement of employment



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Federal Legislative Developments

FLSA Overtime Rule Struck Down *for now*

- Would have more than doubled the minimum salary threshold for exemption

- Still an area of focus

FLSA OVERTIME RULES
WHAT'S GOING ON & HOW SHOULD YOU PREPARE?



16



Federal Legislative Developments

Status of Obama-era Executive Actions

- EEO-1 Expanded reporting requirements stayed
- Fair Pay and Safe Workplaces Rule repealed



17



Federal Legislative Developments

Drug Testing and Unemployment Benefits

- As of March 31, 2017, states are no longer prohibited from drug testing unemployment applicants



18



Federal Legislative Developments

- ◆ Paid Family Leave Proposal
 - Six weeks of paid family leave
 - Funded by states



19



Federal Legislative Developments

- ◆ Bills on the Horizon
 - Employee Rights Act
 - Workforce Democracy and Fairness Act
 - Save Local Business Act
 - National Right to Work Act
 - Raise the Wage Act



20



EEOC Guidance

- ◆ EEOC Issued Guidance On Leave as a Reasonable Accommodation Under the ADA
 - Must consider unpaid medical leave as reasonable accommodation
 - Revise termination provisions
 - Approach undue hardship analysis carefully



21



Sexual Orientation: a protected class under Title VII?

- ◆ “Sex” discrimination vs. “sexual orientation”
- ◆ EEOC interpretation
- ◆ Circuit split

22



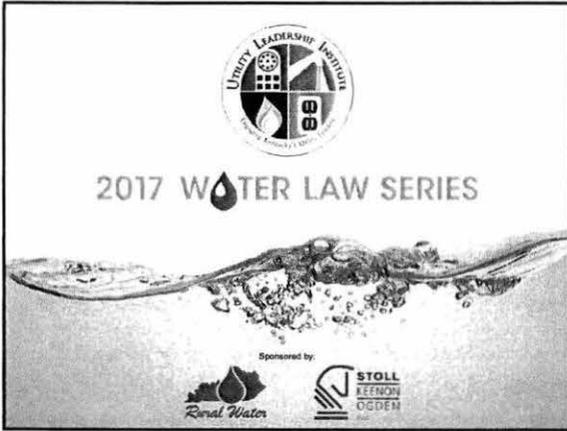
Retaliation: a law unto itself

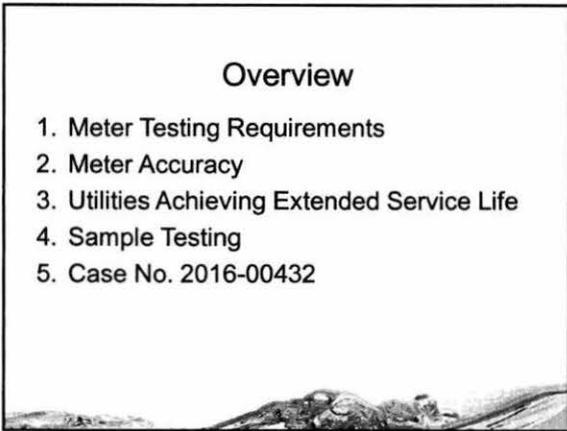
- ◆ Meads v. LFUCG (E.D. Ky. 2017)
 - Sanitation worker in Lexington alleged that he was treated differently from younger, white co-workers
 - Complained to Human Resources and Lexington-Fayette Urban County Human Rights Commission
 - Jury finding: No age or race discrimination

\$200,000 jury verdict for retaliation

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Meter Testing Requirements

- KRS 278.210
 - Establishes statutory standard for meters
 - Meter may not be more than two percent to the disadvantage of the customer (2% **fast**)



Meter Testing Requirements

- KRS 278.210(4):
 - “If a utility demonstrates through sample testing that no statistically significant number of its meters over-register above the limits set out in subsection (3) of this section, the meter testing frequency shall be that **which is determined by the utility to be cost effective.**”



Meter Testing Requirements

- 807 KAR 5:066, Section 15
 - Requires meters be tested prior to initial placement into service
 - Provides accuracy limits for new, rebuilt, and repaired cold water meters
 - Prohibits any new, rebuilt, or repaired meter from being placed in service if it does not register within accuracy limits



**Accuracy Limits:
5/8 x 3/4 Inch Displacement Meters**

- Maximum Rate
 - Flow Rate: 15 gpm
 - Accuracy Limit: 98.5-101.5%
- Intermediate Rate
 - Flow Rate: 2 gpm
 - Accuracy Limit: 98.5-101.5%



**Accuracy Limits:
5/8 x 3/4 Inch Displacement Meters**

- Minimum Rate
 - Flow Rate: 1/4 gpm
 - Accuracy Limit:
 - 95-101% (New and Rebuilt)
 - 90% (Repaired)



Meter Testing Requirements

- 807 KAR 5:066, Section 16
 - "Each utility shall test periodically **all water meters** so that no meter will remain in service without test for a period longer than specified[.]"
 - 5/8 x 3/4 Inch: 10 years



Significant Savings Example

- Utility: 5,000 meters
- Meter cost: \$100
- Annual Savings:
 - 10 years: 500 meters replaced yearly
 - 15 years: 333 meters replaced yearly
 - 167 fewer meters purchased annually → \$16,700 annual savings



Significant Savings Example

- Utility: 5,000 meters
- Meter cost: \$100
- Avoided Capital Expenditures:
 - Utility avoids replacing 2,500 meters over next five years (500 meters per year)
 - One-time savings: \$250,000



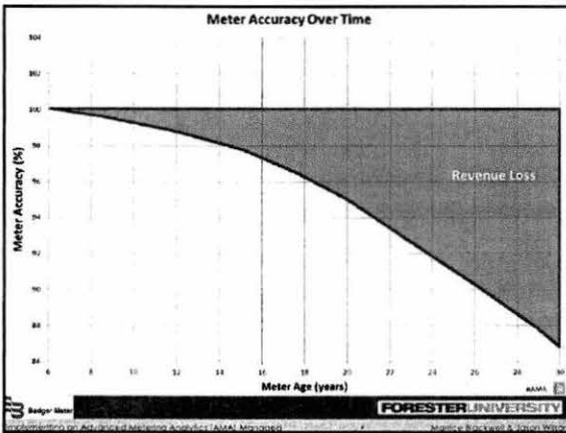
Meter Accuracy



Meter Accuracy

- Meter accuracy > 10 years
- Most meters warranted for accuracy for **at least 15 years**
 - Example: Sensus warranty
 - Sensus SR11: 15 years
 - Sensus iPERL: 20 years





Meter Accuracy

- Declining meter accuracy = slow meters
- Without regulation, utilities would change meters when revenue loss from slow meters > cost to replace meters



Utilities Achieving Extended Service Life



Warren County Water Dist. v. PSC

- Background
 - Case No. 89-110
 - Requested deviation for 14 years → received deviation for 10 years
 - Case No. 97-434
 - Requested deviation for 13 years → approved
 - Case No. 2003-00391
 - Requested to establish sample group → approved



Warren County Water Dist. v. PSC

- Case No. 2011-00220
 - Joint Applicants sought deviation from 10-year testing requirement based upon results of sample testing from Case No. 2003-00391
 - Testing Results:
 - Meters remained within standards for 15 years
 - Lost revenue from inaccurate meters did not exceed cost of testing until 21 years in service



Warren County Water Dist. v. PSC

- Utility: Cost-effective for meters to remain in service without testing for 21 years
 - KRS 278.210(4)
- PSC authorized deviation to permit meters in service for 15 years without testing
 - KRS 278.160(2): Utility may not charge more or less than filed rate schedules
 - KRS 278.170(1): Utility may not give preference or advantage for performing same service

Warren County Water Dist. v. PSC

- Utility brings action for review → REVERSED
- Franklin Circuit Court found:
 - Significant that meters do not over register
 - Sampling plan was cost-effective → met KRS 278.210(4)

Case No. 2009-00253

- Kentucky-American sample tested group of meters
- Meters tested within standard after 15 years of service
- PSC extended time in service to 15 years for meters
- Estimated annual savings: \$90,000
- Estimated annual capital expenditure savings: \$545,000

Sample Testing



- ## Sample Testing
- Sample = subset containing characteristics of a larger population
 - Is sample testing the functional equivalent of testing every meter?
 - Statutes and regulations acknowledge sample testing
- 

- ## Sample Testing
- KRS 278.210(4)
 - “If a utility demonstrates through **sample testing** that no statistically significant number of its meters over-register”
 - 807 KAR 5:041, Section 16 (Electric)
 - 807 KAR 5:022, Section 8(5)(c) (Gas)
- 

Sample Testing

- ANSI/ASQ Z1.9-2003 (R2013), Sampling Procedures and Tables for Inspection by Variables for Percent Nonconforming ["ANSI Standard"]
 - Three Inputs
 - Acceptance Calculation

ANSI Standard

- Three Inputs
 - 1. Acceptance Quality Limit ("AQL")
 - Worst tolerable product average
 - Table A-1
 - PSC Cases
 - Use AQL of 2.0
 - Converts to 2.5

Table A-1
AQL Conversion Table

For specified AQL values falling within these ranges		Use this AQL value
-	to 0.10%	0.10
0.10	to 0.164	0.15
0.165	to 0.25	0.25
0.250	to 0.40	0.40
0.400	to 0.63	0.63
0.630	to 1.00	1.0
1.00	to 1.64	1.5
1.65	to 2.5	2.5
2.50	to 4.0	4.0
4.00	to 6.3	6.3
6.30	to 10.0	10.0

ANSI Standard

- Three Inputs
 - 2. Inspection Level
 - Five different inspection levels
 - A7: "Unless otherwise specified, Inspection Level II shall be used."
 - PSC Cases
 - Inspection Level II

ANSI Standard

- Three Inputs
 - 3. Lot Size
 - Size of entire group
 - Example: Total number of meters of a certain age



ANSI Standard

- Variability Unknown – Standard Deviation
 - Double Specification Limit
- Sample Size Code Letter
 - Based upon inputs, Table A-2 provides Letter
 - 555 meters → Letter "J"

*Table A-2
Sample Size Code Letters*

Lot Size	Inspection Level	
	Special	General
	MS	SI
2 to 8	A	B
9 to 15	B	C
16 to 25	C	D
26 to 35	D	E
36 to 50	E	F
51 to 80	F	G
81 to 125	G	H
126 to 200	H	I
201 to 320	I	J
321 to 500	J	K
501 to 1,000	K	L
1,001 to 1,200	L	M
1,201 to 1,800	M	N
1,801 to 2,500	N	P
2,501 to 3,500	P	Q
3,501 to 5,000	Q	R
5,001 to 7,000	R	S
7,001 to 10,000	S	T
10,001 and over	T	U



ANSI Standard

- Sample Size
 - Table B-3
 - Sample Size Code Letter "J" = 35
 - Must randomly select sample!
 - PSC has approved selections by Excel, billing software, or other computerized process
- Acceptability Criterion
 - Table B-3
 - Sample Size Code Letter "J" and AQL of 2.5 = 5.58



**Case No.
2016-00432**



Case No. 2016-00432

- Request: Sample testing satisfies 807 KAR 5:066, Section 16(1)
 - “Each utility shall test periodically all water meters . . .”
 - Does sample testing satisfy this requirement?
- Alternatively: Deviation from regulation requirements



Case No. 2016-00432

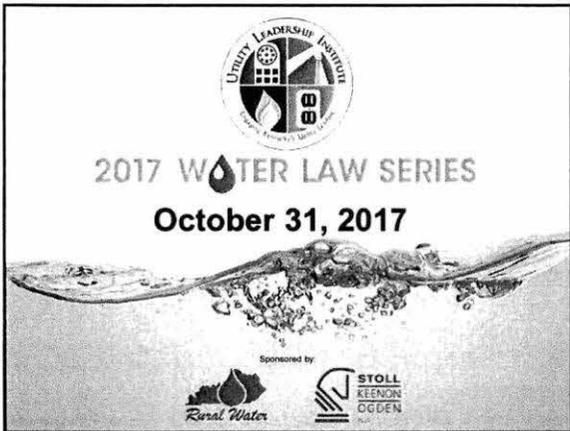
- Sample Testing at Minimum Flow Rate
- Yearly Selection of Sample Group
- Soft Cost Savings
- Different Meter Types
- Damaged Meters

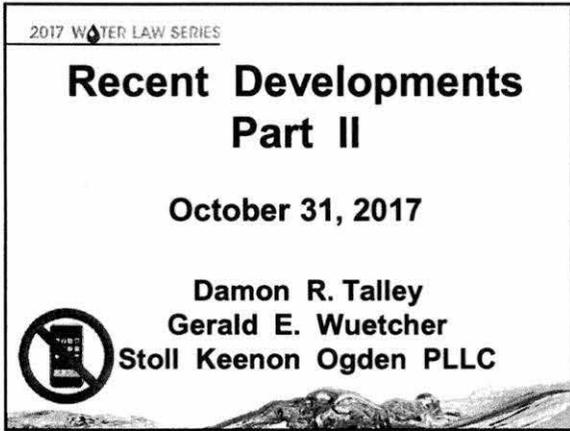


Questions?

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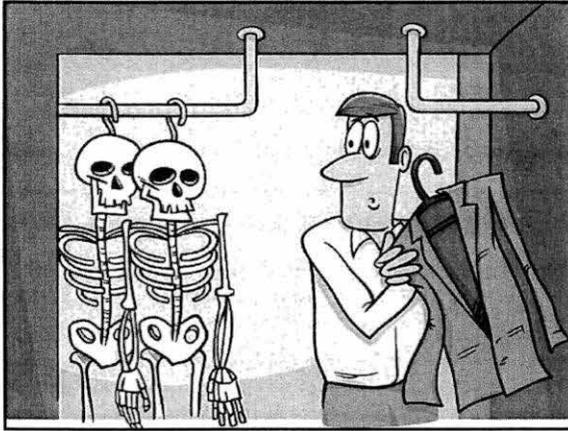






DISCUSSION TOPICS

1. Skeletons in the Closet
2. Recent PSC Hearings
3. Municipal Rate Cases
4. Using Your Attorney Wisely
5. Other



Skeletons

- Ignoring Prior PSC Orders
- Borrowing Money
- Scholarships
- 50th Anniversary Expenses
- Other



Recent PSC Hearings

Recent PSC Hearings

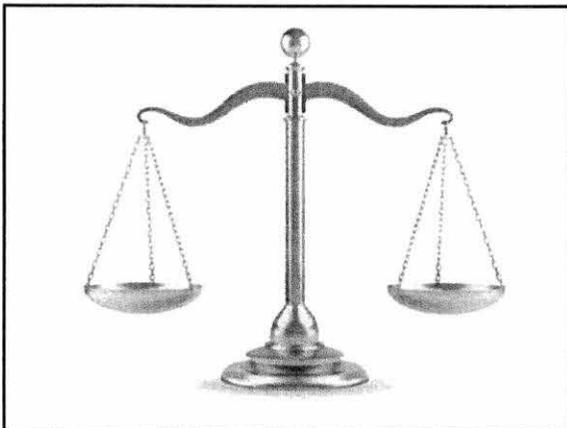
- Preparing for Hearing
- Pitfalls to Avoid
- Lessons Learned
- Utility Perspective

Municipal Rate Cases

Municipal Rate Cases

- Recent Cases
- Rules of the Road
 - Line Loss
 - Pension Expense
 - Depreciation
 - Fringe Benefits
- Case to Watch

Using Attorney Wisely



Using Attorney Wisely

- To Use or Not to Use
- Use Lawyer to:
 - Identify Potential Issues
 - Avoid Procedural Delays
 - Prepare for Hearing
 - Hearing
- Standby Role Only?



QUESTIONS?

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STOLL
KLENON
OGDEN

Ask the Lawyers

Notes or Questions:

