

RECENT DEVELOPMENTS IN WATER UTILITY LAW

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*The opinions expressed in this outline are solely the author's and do not necessarily reflect those of the Public Service Commission or any other person employed by the Public Service Commission.

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I. INTRODUCTION

II. LEGISLATIVE DEVELOPMENTS

A. 2007 General Session

1. House Bill 448 – Amends KRS 65.065 to increase to \$750,000 from \$400,000 the amount of annual revenue or expenses required for the performance of an annual audit.

2. House Bill 490 – Kentucky Fairness Construction Act. Amends KRS Chapter 371 to provide certain terms for construction contracts, to include time limits for payment to contractor and subcontractor, permitting a contractor to recover costs resulting from delay of the contracting entity, and caps on retainage. Any contract for construction of or relating to a facility as defined in KRS Chapter 278 is exempted. Any contract financed under a lien accommodation with Rural Utilities Service (RUS) or entered into by a borrower of funds from RUS is exempted.

3. Senate Bill 76 – Amends KRS Chapter 147A to place Kentucky Infrastructure Authority under Governor's Office of Local Development for administrative purposes.

4. Senate Bill 96 – Amends various provisions of KRS Chapter 74 (not enacted).

5. Senate Joint Resolution 109 – Required the Environmental and Public Protection Cabinet to create a Drought Mitigation and Response Advisory Council and to develop a drought mitigation and response plan to provide for drought mitigation and emergency planning. Council's report must be submitted to the Legislative Research Commission and to the Interim Joint Committee on Agriculture and Natural Resources by December 31, 2008.

B. 2008 General Session

1. House Bill 83 – Amends various provisions of KRS Chapter 74.

2. House Bill 330 – Amends KRS 61.823(4) to provide that a public agency may satisfy the notice requirements for a special meeting by use of electronic mail for those public agency members and media organizations that have filed a written request with the public agency indicating their preference to receive electronic mail notification.

3. House Bill 426 – Amends KRS 514.040 to increase the amount that a merchant may charge as a bad check fee to \$50.

4. House Bill 435 – Amends KRS Chapter 65 to require a special district to notify the state local debt officer in writing before entering into any financing obligation, lease, bond issuance, or any long-term debt obligation when the lease price exceeds two hundred thousand dollars (\$200,000).

5. House Bill 506 – Amends KRS Chapter 81 to establish procedures for the annexation of an incorporated area containing utility infrastructure of a city-owned utility by another city and to require the consent of the city that owns the utility infrastructure.

6. Senate Bill 23 – Amends KRS 323.033 to prohibit a political subdivision of the state from engaging in the construction of any public work involving the practice of engineering or architecture unless the plans, specifications, and estimates have been prepared and the administration of construction contracts are executed under the direct supervision of a licensed architect or profession engineer.

6. Senate Bill 100 – Amends KRS 45A.415 (Local Model Procurement Code) to require local public agencies to ensure that every invitation for bids provides that an item equal to that named or described in the specifications may be furnished; Amends KRS 65.025 to establish best value procurement criteria for use in local government capital construction projects (includes water districts).

7. General Assembly failed to place in budget bill an exemption from KRS 278.020(1) for certain water district and water association construction projects.

C. 2009 General Session

1. Senate Bill 20 – Amends KRS 224.030A to expand the board of Kentucky Infrastructure Authority from 9 to 11 members and to specifically provide that one member of board will be selected from a list of nominees submitted by the Kentucky Municipal Utilities Association.

2. House Bill 117 – Amends KRS 65.565 to require employer participants to make, in addition to normal service payments, a “past service liability” payments to reduce total past unfunded service liabilities of county employees retirement system. States the intent of General Assembly to begin phasing into the full actuarially required contribution rates for the Kentucky Employees Retirement System and the State Police

Retirement System and to achieve 100 percent actuarially required contribution rate by FY2025.

3. House Bill 161 – Amends KRS 62.990(2) to lessen the penalty for an official's failure to take the oath of office within 30 days of notice of appointment where failure occurred before January 1, 2010. If failure occurs before January 1, 2010, office is merely declared vacant. If failure occurs on January 1, 2010 or after, the office is declared vacant and offending official is ineligible to serve in the same office for two years.

4. House Bill 181 – Repealed and reenacted House Bill of 2008 General Session dealing with appropriations for infrastructure projects.

5. House Bill 204 – Amended KRS 78.510 to increase the number of months to nine from six for which an employee qualifies as being employed in a seasonal position for purposes of the county employees' retirement system.

6. House Bill 422 – Amend KRS Chapter 65 to provide for the creation of regional wastewater commissions to collect, transport and treat wastewater and storm water of member cities, water districts, sanitation districts, and federal agencies (Not Enacted).

D. 2009 Special Session – House Bill 4:

1. Provides that, notwithstanding KRS 74.020(4), a non-resident of water district may serve as a member of water district's board of commissioners if a customer of the water district (effective until June 30, 2010).

2. Amended Budget authorization for Bluegrass Water Supply Commission to permit previously allocated funds to refinance prior obligations for engineering and planning expenses for regional water supply improvements.

E. 2010 General Session

1. House Bill 201 – Amends KRS Chapter 74 to require newly appointed water district commissioners to attend 12 hours of training that Public Service Commission is mandated to conduct as a condition to retaining office. Further requires a water district to report changes in the membership of its board of commissioners within 30 days of the change. Authorizes Public Service Commission to fill vacancies on a water district's board of commissioners that have existed for 90 days or more regardless of the reason for the vacancy. [On August 19, 2010, the PSC

Executive Director issued a letter to all water districts in which he provided guidance on the notice to be provided.]

2. House Bill 221 – Amends KRS Chapter 65 to provide for the creation of regional wastewater commissions to collect, transport and treat wastewater and storm water of member cities, water districts, sanitation districts, and federal agencies. Subsequently revised to a pilot project area limited to Bullitt, Hardin, Jefferson, Meade, Nelson, Oldham, and Spencer Counties (Not Enacted).

3. House Bill 418 – Amends KRS 43.050 to permit the Auditor of Public Accounts to investigate and examine all special districts and water associations or organizations located in the Commonwealth if they are funded, in whole or in part, with federal or state moneys (Not Enacted).

4. House Bill 454 – Creates new sections of KRS 376 to authorize municipal utilities that provide gas, electric, sewer or water service to retail business customers to impose a lien on their property for any outstanding charges and fees when utility bill is in arrears in excess of \$10,000. Definition of “Municipal utilities” includes water districts.

5. House Bill 504 – Amends KRS Chapter 224 to require, to the extent allowable, the Environmental and Public Protection Cabinet to consider affordability, flexibility in implementation schedules, and other factors when issuing wet weather discharge permits under KRS 224.16-050.

6. Senate Bill 45 – Creates a new section of KRS Chapter 45A to give preference to Kentucky resident bidders in state construction contracts. This preference applies against a nonresident bidder registered in any state that gives or requires a preference to bidders from that state. Specifies that the preference is equal to the preference given or required by the state of the non-resident bidder; include determination of the amount of the preference. Requires the Finance and Administration Cabinet to promulgate administrative regulations on the process for establishing residency and to list states with a bid preference in place, including the amount of that preference. Local governments, including water districts; must apply the preference. [Finance and Administration Cabinet issued 200 KAR 5:400 on September 14, 2010.]

7. Senate Bill 88 – Creates a new section of KRS Chapter 65 that requires organizations representing statewide associations composed of local elected officials and affiliates of such organizations to comply with provisions of Open Records Act and Open Meetings Act. Further requires such organizations to establish for a Web site and to include a database containing information relating to the entities' expenditures on such site. Establishes auditing requirements for such organizations and requires

their adoption of procurement, ethics, personnel and compensation, and complaints policies and the training of local officials in related responsibilities.

8. Senate Bill 176 – Allows for the use of reverse auctions in government purchasing.

F. 2010 Special Session – House Bill 1.

1. Special appropriation of \$400,000 in fiscal year 2010-2011 and \$400,000 in fiscal year 2011-2012 for small utilities assistance.

2. Exemption from KRS 278.020(1) requirement for a Certificate of Public Convenience and Necessity for certain water improvement projects that Class A and Class B water districts and water associations constructed.

G. 2011 General Session.

1. House Bill 26.

a. Amends KRS Chapter 65 to provide for the creation of a pilot regional wastewater commission limited to Bullitt, Hardin, Jefferson, Meade, Oldham, and Spencer Counties area to collect, transport and treat wastewater and storm water of member cities, water districts, sanitation districts, and federal agencies.

b. Amends KRS Chapter 220 to require sanitation districts with 10,000 or more customer accounts to obtain the approval of fiscal court of the county in which it serves prior to any adjustment of rates that exceeds 5 percent. For multi-county sanitation districts, the approval of a majority of all fiscal courts must be obtained before a rate adjustment can be implemented.

c. Amends KRS Chapter 220 to require sanitation districts with 10,000 or more customer accounts to create a web site and to display on such site all records relating to the sanitation district's expenditures in a searchable format. Information must be updated monthly and remain on website for at least 3 years.

2. House Bill 330. Amends KRS 278.021 regarding the appointment of receivers for abandoned utilities. Defines "abandonment to include relinquishment or surrender of utility property; notice to Public Service Commission of intent to abandon property; failure to comply with Commission orders to necessary to ensure that utility provides adequate service; and failure to meet obligations to suppliers and inability or

unwillingness to take necessary actions to correct failure where failure poses an imminent threat to the continued availability of gas, water, water or sewer service. Provides for Public Service Commission to seek appointment of a receiver of utility assets without Commission proceeding where immediate threat to public health, safety or continuity of utility service. Requires utilities to provide written notice to the Commission within one business day of receiving a supplier's notice of discontinuance of service to utility. Requires utilities subject to Commission jurisdiction to notify the Commission at least 30 days before terminating service to another jurisdictional utility.

3. House Concurrent Resolution 37. Resolution supporting federal legislation to require the United States Environmental Protection Agency (EPA) to consider affordability and the financial capabilities of communities when implementing its Combined Sewer Overflow (CSO) control measures.

4. Senate Bill 151. Senate version amends KRS Chapter 278 to expand the number of Public Service Commissioners to seven and to provide for election of commissioners. House of Representatives voted for a substitute that requires a study of the issue of election of public service commissioners and of public service commission regulation of municipal utilities. (Not enacted.)

III. Court Decisions

A. *Public Service Commission v. Commonwealth of Kentucky*, 324 S.W.3d 373 (Ky. 2010). Kentucky Supreme Court affirming in part and reversing in part an opinion of Kentucky Court of Appeals. Court of Appeals had reversed Franklin Circuit Court opinion holding that KRS 278.509 violated Kentucky Constitution Section 51 and that the Commission may not authorize a utility to collect a surcharge unless specific statutory authority for the surcharge existed. Court of Appeals had held that KRS 278.030 and 278.040 grant Commission plenary ratemaking authority and that PSC has the authority to authorize the collection of surcharges not specifically authorized by statute but may not authorize surcharges to recover costs related to capital expenditures that are **not** beyond the utility's control, fluctuating, unanticipated or threaten the utility's solvency. Held: So long as the rates established were fair, just and reasonable, the Commission has broad ratemaking power to allow recovery of such costs outside the parameters of a general rate case and even in the absence of a statute specifically authorizing recovery of such costs. Nothing in the Kentucky statutes forbids single-issue ratemaking.

B. *Public Service Commission v. Commonwealth of Kentucky*, 320 S.W.3d 660 (Ky. 2010). The Commission approved an economic development rate (EDR) for electric utility that provided for a lower rate for qualifying customers

who make new capital investment in electric utility's service area. Alleging that Commission's actions violated KRS 278.170, Attorney General brought an action for review. Franklin Circuit Court affirmed. Reversing on appeal, the Kentucky Court of Appeals held: KRS 278.030 and KRS 278.170 are not related. The Commission could not establish a rate classification for certain economic and brownfield development projects that would result in a lower rate for electric service than other rate classifications unless those in that classification were eligible for reduced rate or free service as set forth in KRS 278.170. Kentucky Court of Appeals rejected arguments that KRS 278.170 applies only to reduced rates among customers within the same rate classification. Reversing the Court of Appeals, the Kentucky Supreme Court held that KRS Chapter 278 permits EDRs. "While utilities are statutorily entitled to offer reduced rates to the persons and entities identified in KRS 278.170(2) and (3), those utilities may also offer other customers reduced rates subject to PSC approval and compliance with general statutory guidelines regarding reasonableness."

C. *Louisville Gas and Electric Co. v. Hardin and Meade County Property Owners for Co-Location*, 319 S.W.3d 397 (Ky. 2010). Held: Holding of *Forest Hills Developers, Inc. v. Public Service Commission*, 936 S.W.2d 94 (Ky. App. 1996) upheld. Failure of party bringing an action to review PSC to file a designation of record with court or to move for an enlargement of time to designate the record deprives reviewing court of jurisdiction over the action.

D. *Kentucky Public Service Commission v. Shadoan*, 325 S.W.3d 360 (Ky. 2010). Held: Party bringing an action for review of Commission Order pursuant to KRS 278.410 complies with KRS 278.420 by attaching a copy of the Order to its complaint when there is no evidentiary record in the Commission proceedings and the sole issue on review is one of law. [Holding limits the scope of *Louisville Gas and Electric Co. v. Hardin and Meade County Property Owners for Co-Location*.]

E. *Georgetown Municipal Water and Sewer Service v. Bur-Wal, Inc.*, 243 S.W.3d 661 (Ky. App. 2007) (No. 2006-CA-000278-MR). Developers brought action against a municipal water utility to recover the costs to install water and sewer lines within the boundaries of a residential subdivision. Developers assert that KRS 96.539 required municipal utility to develop rules for extension of service lines and authorized reimbursement of the cost of installation of such lines. Trial Court found for developers. Reversing lower court, Kentucky Court of Appeals found that developers are not applicants for service or customers and that KRS 96.539 requires refunds only to customers or applicants for service. It further found that KRS 96.539 provides for refunds only where payment for the extension of lines have been made directly to the utility. Court affirmed portion of lower court's decision that directed municipal utility to establish rules for extensions.

F. *Louisville/Jefferson County Metro Ethics Commission v. Schardein*, 259 S.W3d 510 (Ky.App. 2008). Officers and employees of Louisville-Jefferson County Metropolitan Sewer District (MSD) sought to enjoin proceedings of Louisville Metro Ethics Commission for alleged violations of Metro Ethics Code. Finding that MSD was a separate corporate entity and not a part of Metro Government and that Metro Ethics Code was not applicable, Circuit Court granted requested relief. On appeal, Court of Appeals affirmed. Held: MSD is not an agency of Metro Government, but is an independent political subdivision of the state and is not subject to local ethics codes that KRS 65.003 requires. Reasoning of decision can be applied to other special districts such as water districts and sanitation districts.

G. *Kentucky Public Service Commission v. Shadoan*, 2008 WL 2468766 (Ky. App. June 20, 2008) (No. 2007-CA-000697). Held: Plaintiff bringing an action for review of Commission Order must designate record of administrative proceeding within 10 days of filing complaint for Franklin Circuit Court to have jurisdiction over the action. Where action for review is solely based upon a question of law, attaching a copy of the Commission Order to the Complaint is sufficient to meet the substantive requirements of a designation of record. The better practice, however, is to file with the Court a document that designates the portions of the record necessary for the Court to review the Order.

H. *Young v. Public Service Commission*, 2010 WL 4739964 (Ky.App Nov. 24, 2010) No. 2009-CA-000292-MR). Person denied intervention in a Commission proceeding brings an action for review of Commission Order denying intervention while Commission proceeding is still pending. Finding that the Commission order was interlocutory and not ripe for adjudication, Franklin Circuit Court dismissed action. On appeal to Court of Appeals, held: Commission's denial of motion to intervene was interlocutory. Any appeal of the denial must occur after the final adjudication in the underlying case.

I. *Callihan v. Public Service Commission*, No. 2007-CA-001227-MR (Dec. 5, 2008). Court of Appeals affirmed Franklin Circuit Court Order dismissing an action for review of Commission Order for lack of jurisdiction. It found that the lower court had correctly found that plaintiff's failure to designate the record within the time period specified in KRS 278.420 deprived the Court of jurisdiction.

J. *Carroll County Water District No. 1 v. Gallatin County Water District*, No. 08-CI-00194 (Gallatin Cir. Ct. Apr. 10, 2009). Carroll District appealed an order of Gallatin County Judge/Executive allowing Gallatin County Water District to annex areas within Carroll District's territory. Held: A water district does not have an exclusive territory. Its area is subject to annexation by another water district so long as the annexation does not "takeover" territory held by the original water district. County Judge/Executive properly found that 7 U.S.C 1926 does not prevent enlargement of territory in this case. Gallatin Circuit Court affirmed the order.

K. *Carroll County Water District No. 1 v. Gallatin County Water District*, No. 2009-CA-000864 (Ky. Ct. App. Apr. 23, 2010). Court of Appeals affirmed Gallatin Circuit Court decision in No. 08-CI-00194. Held: Carroll District failed to demonstrate that Gallatin District was infringing upon Carroll District's territory rights by servicing property in Carroll District's territory. Water districts do not have an exclusive right to service their territory. Sole issue is whether a wasteful duplication of service results. Court finds none since no there was no water service within the service area.

L. *Gallatin County Water District v. Public Service Commission*, No. 08-CI-01669 (Franklin Cir. Ct. Sep. 15, 2009). Gallatin District brought an action for review of PSC Order that held a water district's construction of facilities to serve persons outside its territory and within the territory of another water district was not construction in the ordinary course and required a certificate of public convenience and necessity. Held: PSC lacks jurisdiction to determine territory disputes between water districts even where the dispute may potentially require the construction of unnecessary and wastefully duplicative. Further held: Water Districts do not have exclusive territory even with regard to other water districts.

M. *Gallatin County Water District v. Public Service Commission*, No. 08-CI-01669 (Franklin Circuit Court Feb. 18, 2010). PSC moved to vacate Franklin Circuit Court Order of September 15, 2009. Franklin Circuit Court denied motion, and affirmed and modified its earlier Order. Held: That PSC erred in failing to consider post-annexation rights of Gallatin District when it held that Gallatin District's construction of facilities in an area already served by Carroll District was not an extension in the ordinary course and required a certificate of public convenience and necessity. "The involvement of KRS Chapter 74 affects the PSC's authority in that the PSC may not create a water boundary where the courts have determined there is no boundary."

N. *Northern Kentucky Water District v. Public Service Commission*, No. 2008-CA-002284 (Ky. Ct. App. Dec. 11, 2009). Water District brought action for review of PSC Order rejecting water district's proposed rules related to cross-connection program. Franklin Circuit Court denied action. On appeal, Kentucky Court of Appeals held that PSC has jurisdiction over cross-connection programs. Court noted that cross-connections is an aspect of utility service and that, while Division of Water may prohibit cross-connections, PSC must ultimately determine if a utility's regulations on cross-connections are appropriate.

O. *Jent v. Kentucky Utilities Co.*, No. 2008-CA-001565 (Ky. Ct. App. April 30, 2010). Electric utility brought eminent domain action against a property owner to obtain an easement necessary for construction of electric transmission line. Electric utility had previously obtained a Certificate of Public Convenience and Necessity from PSC to construct an electric transmission line. The property owner had intervened in the PSC proceeding and subsequently brought action

for review of PSC Order. Contesting eminent domain action, property owner argued that eminent domain action could not proceed until all appeals of PSC Order exhausted. Hardin Circuit Court disagreed. On appeal, Court of Appeals affirmed. Held: Utility is not required to obtain a non-appealable Certificate of Public Convenience and Necessity before initiating eminent domain action. As long as PSC remains in effect and has not been stayed or vacated by a court of competent jurisdiction, there is “reasonable assurance” that utility will have acquired necessary permits from PSC.

P. *Christian County Water District v. Hopkinsville Water and Sewer Comm’n*, No. 2009-CA-001543 (Ky. Ct. App. Aug. 13, 2010). Water district entered an agreement with municipal utility to resolve dispute over rates that municipal utility assessed. As part of agreement, the water district agreed to transfer service territory in qualified areas upon municipal utility’s request. Water district failed to execute transfer when municipal utility requested. Municipal utility filed action seeking a declaration of the rights and responsibilities of both parties under the agreement. Circuit Court found that agreement was enforceable and within Court’s jurisdiction to enforce. Arguing that the court lacked jurisdiction and that PSC was the proper forum, water district appealed. Court of Appeals affirmed. Held: While PSC has jurisdiction over the rates that a municipal utility assesses a water district for utility service, PSC has no jurisdiction over the territory issues. Contract is subject to an approval process established in KRS 74.110. “No provision is made for concurrent jurisdiction between the court and the PSC.”

IV. Attorney General Opinions

A. Nature of Attorney General Opinions

1. KRS 15.020: The Attorney General is “the chief law officer of the Commonwealth of Kentucky and all of its departments, commissions, agencies, and political subdivisions, and the legal adviser of all state officers, departments, commissions, and agencies, and when requested in writing shall furnish to them his written opinion touching any of their official duties . . .”

2. See *York v. Commonwealth*, App., 815 S.W.2d 415, 417 (Ky. App. 1991) (“An attorney general’s opinion is highly persuasive, but not binding on the recipient.”).

B. OAG 08-ORD-139

1. Group requested records from a water association relating to the construction of a water pipeline through Shelby County, Kentucky. Water association did not answer request. Upon complaint to Attorney General, water association asserted that it was not a public agency and not subject to the Open Records Act. Water association had received a \$1.5 million

grant from the Commonwealth for the construction of a 12-inch water transmission line. Water association provided a copy of all documents related to grant.

2. Held: A water association organized under KRS Chapter 273 as a nonprofit corporation is not a political subdivision, agent of a political subdivision, or special district. It is not generally subject to the Open Records Act or Open Meetings Act. Such corporations are public agencies for purposes of the *Open Records Act* only if they derive at least 25 percent of their funds from state or local authority. Requester is entitled to inspect all records related to functions, activities, programs, or operations funded by the state grant, but is not entitled to inspect the water association's remaining records inasmuch as those records are not public records for open records purposes.

C. OAG 08-ORD-147

1. Person requested copies of certain documents from water district. Requester resides in the county in which water district is located. Water district failed to respond to request within 3 days. After requester filed a complaint with Attorney General, the water district responded contending that the request was overly broad and burdensome, requested a more specific request for documents, and required that requester first inspect the records.

2. Held: Water district is subject to Open Records Act. It must respond to request for documents within 3 business days of receipt of request. Procedural requirements of the Open Records Act are not mere formalities, but are an essential part of the prompt and orderly processing of an Open Records Act request. Where the requester resides or has its principal place of business in the county where the public records are located, the public agency may require the requester to inspect the requested documents at its offices before providing copies. Inspection is not required where the requestor resides or has its principal place of business outside of the county where the public records are located. Where request for records is made by mail, the requester must precisely describe the records that it is seeking. When a precise description is not provided, the public agency meets the requirements of the Open Records Act by making the documents available for inspection.

D. OAG 09-OMD-081

1. Eastern Rockcastle Water Association refused a request of several members of the public to attend a regularly scheduled meeting of its Board of Directors. When requestors attempted to attend meeting, the water association contacted the local sheriff's office, which sent two deputies to

escort requestors from the meeting location. The requestors then requested that all future meetings of the water association be conducted in accordance with the Open Meetings Act. The water association did not respond to the request. Requestors then filed a complaint with Attorney General.

2. Held: A water association is a private, non-profit corporation and is not a public agency for purposes of the Open Meetings Act. The board of the water association is not required to comply with the provisions of the Open Meetings Act.

- E. OAG 2010-ORD-179. Eastern Rockcastle Water Association found to have violated Open Records Act by failing to response to request for records within three business days. Attorney General noted earlier opinion in OAG 09-OMD-081, but found that water association failed to assert that it was not subject to Open Records Act and that he was bound by the record in the existing case.
- F OAG 2010-ORD-213. Eastern Rockcastle Water Association found to violate Open Records Act by requiring requester to schedule an appointment for inspection as that constitutes an illegal restriction upon access. Opinion contains no discussion regarding water association's status as a government entity.

V. Public Service Commission Decisions (2007 – Present)

A. Automatic Adjustment Mechanisms

1. Case No. 2006-00072, *City of North Middletown* (Ky. PSC Jan. 12, 2007). Commission found that municipal utility violated Commission's Order of August 1, 1994 in Administrative Case No. 351 and KRS 278.160 by failing to file with the Commission its contract to supply water to a water association. Commission further found that municipal utility violated KRS 278.180 by failing to provide Commission with notice of rate adjustment before adjusting its wholesale rate. The Commission rejected contention that purchased water adjustment provision in wholesale contract that permitted municipal utility to adjust its rates to reflect an increase in a supplier's rates relieved the municipal utility of its obligation to notify the Commission of the proposed adjustment. The Commission did not find the contract as containing a precise rate-making formula or an automatic mechanism for passing through increases in a supplier's rates for purchased water. The Commission further noted that if contract had contained such a precise formula, no violation of KRS 278.180 would have occurred.

2. Case No. 2007-00299, *Bath County Water District* (Ky. PSC Sep. 26, 2007). Held that a recalculation of rate schedule required by an automatic adjustment mechanism in a wholesale water contract did not constitute an adjustment in rates as defined in KRS 278.180. “[A]s the formula set forth in the contract between Morehead and Bath District is the rate for wholesale water service and as this formula has remained unchanged since the contract’s execution, KRS 278.180(1) did not require 30 days’ notice to the Commission of the recalculated cost components.”

3. Case No. 2009-00072, *Grayson County Water District* (Ky. PSC Mar. 23, 2009). Commission permitted a water district to adjust its rates pursuant to purchased water adjustment mechanism where its municipal utility supplier had not provided notice of proposed wholesale rate adjustment to the Commission. Adjustment of wholesale rate was based upon an adjustment mechanism set forth in a series of contract amendments filed with the Commission. The municipal wholesale supplier did not file any notice of the recalculated wholesale rate with the Commission before making adjustment.

4. Case No. 2010-00074, *South Hopkins Water District* (Ky. PSC Sep.22, 2010). Commission on its own motion created an automatic adjustment mechanism to permit a water district to pass through the cost of payments made to its water supplier as a result of annual audit of supplier’s water costs and billed after water district had provided water service to its customers. Adjustment mechanism contained a component to ensure exact recovery of payment amounts.

B. Water Distribution Main Extension Policies: Real Estate Subdivisions

1. Case No. 2006-00118, *South Anderson Water District* (Ky. PSC Aug. 16, 2007). The Commission authorized a deviation from Administrative Regulation 807 KAR 5:066, Section 11(3), to permit a water district to limit the amount of refunds in a calendar year to real estate subdivision developers for connections made to a water main extension to a real estate subdivision. The Commission-approved deviation potentially lengthened the time period that a real estate subdivision must wait before receiving refund, but required all refunds within 10-year period. The Order contains an extended analysis of Section 11(3) and effectively rejected the Commission’s conclusions in Administrative Case No. 386 regarding Section 11(3).

2. Case No. 2006-00542, *West McCracken Water District* (Ky. PSC June 22, 2007). Commission approved water district’s proposal to require real estate subdivision developers to deposit 5 percent of total water main extension costs to cover the cost of re-grading and re-landscaping on and around water main extension. Deposit was to be refunded after one year.

C. Transfer of Control of Utility

1. Case No. 2006-00197, *Kentucky-American Water Company* (Ky. PSC April 16, 2007). Investor-owned water utility sought approval for initial public offering (IPO) of stock. The Commission found that IPO did not constitute an acquisition of control as within KRS 278.020(6), but did constitute a transfer of control within KRS 278.020(5). The Commission further found that KRS 278.020(5) required the Commission to determine if the proposed transfer of control was “consistent with the public interest” and empowered the Commission to impose conditions on the proposed transfer of control to “ensure that it will not adversely affect utility service.” The Commission further held that when reviewing an IPO where the identity of the acquiring parties cannot be discerned before the IPO “an accurate assessment of the acquiring parties’ ability to provide utility service can be made through an examination of the abilities of the management that is currently in place and will remain in place after the transaction is completed.”

2. Case No. 2007-00488, *Auxier Water Co.* (Ky. PSC Mar. 14, 2008). Investor-owned water utility and municipal utility jointly applied for Commission approval of municipal utility’s acquisition of the water utility. The Commission granted the application, but imposed conditions upon the transfer to include refund of the water utility’s customer deposits and limiting the rate that the municipal utility could impose upon the former customers of the water utility.

3. Case No. 2008-00074, *Hardin County Water District No. 1* (Ky. PSC Apr. 23, 2008). Water district applied to the Commission for approval of acquisition of municipal sewer system, authority to assume the municipal utility’s debt, and authority to continue charging the municipal utility’s existing rate. Finding that a municipal utility is not a utility for purposes of KRS 278.020(5) and (6), the Commission held that Commission approval of the transfer was not required. The Commission held that a public utility should generally assess the same rates to the customers of the acquired non-jurisdictional municipal utility as those assessed to its existing customers, but that the public utility’s filed rates are presumed to be reasonable as a matter of law. Finding that extenuating circumstances existed, the Commission authorized the water district to continuing assessing the rates that the municipal utility had assessed for sewer services.

4. Case No. 2009-00494, *Shadowwood Waste Environmental, LLC* (Ky. PSC Feb. 26, 2010). Louisville-Jefferson County Metropolitan Sewer District petitioned for approval of its acquisition of control of a sewer utility that served a subdivision in Jefferson County. Its application was submitted 15 months after the *defacto* acquisition. During proceeding the

Commission discovered that the sewer utility, while under MSD's operation, had been assessing rates that differed from those in the sewer utility's filed rate schedule. Finding that MSD had requisite abilities to provide reasonable utility service and that transfer was in public interest, the Commission approved transfer on the condition that any collected amounts in excess of the filed rates be refunded. (MSD did not accept condition and has brought an action for review.)

D. Surcharges

1. Case No. 2006-00315, *Northern Kentucky Water District* (Ky. PSC Dec. 26, 2007). The Commission approved water district's application for a surcharge to finance water main extension in a new "subdistrict." Subdistrict was not geographically based, but defined by customer density among remaining unserved areas in county. Held: "Where a subdistrict is created for rate-making purposes, the areas placed within that subdistrict should have some common characteristic or interest. The proponent of the subdistrict's creation bears the burden of demonstrating the reasonableness of the subdistrict's boundaries. At a minimum, it should demonstrate that the subdistrict's territories are served by common utility plant and facilities or share common geographic characteristics. Absent such demonstration, any rate that is based solely on a customer's location within the subdistrict's territory may be deemed unreasonable. Areas within proposed subdistrict had a common characteristic – high customer density. The use of customer density as the distinguishing factor to develop a rate to recover the cost of water main extensions to unserved areas may be reasonable depending upon the circumstances of the extension."

2. Case No. 2009-00353, *Louisville Gas and Electric Company and Kentucky Utilities Company* (Ky. PSC Oct. 21, 2009). Electric utilities applied for authorization to assess a separate surcharge to recover the costs related to wind power contracts. Issue: Did utilities' application for a surcharge constitute an application for general rate adjustment that must comply with the filing requirements of 807 KAR 5:001, Section 10? Held: Yes. As surcharge applied to all customers and was compensation paid to utilities, it was a "rate." By proposing to charge each customer a new rate in addition to existing rates, the utilities were proposing general adjustments to their existing rates and such adjustments can only be made when there has been compliance with the filing requirements set forth in 807 KAR 5:001, Section 10, or when the filing requirements have been waived upon a showing of good cause. "To justify the authorization of a surcharge to recover a particular category of costs, such as those for wind power, a utility must first demonstrate, among other things, that its existing rates are insufficient to cover all of its reasonable costs, including those proposed to be recovered by the surcharge. Thus, the exhibits and

documents required to be filed pursuant to 807 KAR 5:001, Section 10, are essential for an investigation of whether or not the existing rates . . . are insufficient since, absent findings of insufficiency, there would be no justification for the authorization of the proposed surcharges.”

E. Late Payment Fees

1. Case No. 2006-00365, *Kentucky Dam Village State Park v. North Marshall Water District* (Ky. PSC July 31, 2007). State park brought complaint against water district in which it alleged that water district had unlawfully assessed a late fee. The Commission rejected state park’s contention that KRS 45.453 and KRS 45.454 limited the late payment fees that a utility could impose on a state agency and held that KRS 278.160 requires that a utility must apply the terms of its filed rate schedules to state government agencies in the same manner as it would to all other customers.

2. Case No. 2008-00047, *Barkley Lake Water District* (Ky. PSC June 30, 2008). Water district sought declaratory ruling regarding the assessment of a late penalty fee for payments that were received but misplaced by U.S. Postal Service. The Commission held that water district had received payments when delivered to its post office box, even if Postal Service subsequently misplaced the mail, and that late payment fee could not be assessed.

F. Commission Failure to Rule on Municipal Wholesale Rate within 10 Months: Case No. 2006-00403, *City of Falmouth, Kentucky* (Ky. PSC June 27, 2007). The Commission failed to enter a final decision upon the reasonableness of municipal utility’s proposed increase to its wholesale water service rate within 10 months of its notice to Commission. Held: When a city contracts with a public utility to provide utility service, it loses its exemption from Commission jurisdiction and becomes a public utility subject to the provisions of KRS Chapter 278. KRS 278.180(1) provides that a utility may not change any rate without 30 days’ notice to the Commission. KRS 278.190(1) authorizes the Commission to hold a hearing on and otherwise investigate the reasonableness of a proposed rate. KRS 278.190(3) requires that the Commission complete its investigation and render a final decision within 10 months of the filing of the proposed rate. The Commission’s failure to render a decision within this period will result in the proposed rates becoming effective.

G. Commission Failure to Suspend on Proposed Rate Adjustment: Case No. 2007-00199, *South Shore Water Works* (Ky. PSC Mar. 24, 2008). Water utility applied for adjustment of water rates and included a rate schedule that provided for the proposed rates to become effective within 30 days of its filing. Commission failed to suspend the proposed rates within 30 days of filing. Held:

As a result of the Commission's failure to suspend the proposed rates, the rates became effective by operation of law on the 31st day.

H. Removal of Water District Commissioner

1. Case No. 2007-00373, *Joe Conley v. Magoffin County Water District* (Ky. PSC Mar. 24, 2008). The Commission investigated allegations that a water district commissioner was not eligible to serve because he was not a resident of the water district. The Commission dismissed the complaint after determining that the water district commissioner resided within the water district's boundaries.

2. Case No. 2009-00209, *Legal Qualifications of Toni Akers and Michael Litafik* (Ky. PSC Aug. 20, 2009). The Commission investigated allegations that two water district commissioners failed to meet the residency requirements set forth in KRS 74.020. After finding that the commissioners no longer resided in the water district's territory and did not currently resided in an unincorporated or incorporated area that the water district served, the Commission held that cause existed to remove them and ordered their immediate removal.

I. Water District Commissioner Training

1. Case No. 2007-00387, *Northern Kentucky Water District* (Ky. PSC Feb. 28, 2008). Water district applied for accreditation of "in-house" water management training programs. While noting several significant concerns with such programs, the Commission found that these concerns "do not serve as an adequate basis for denying accreditation." The Commission further found that, "to ensure compliance with the letter and spirit of 807 KAR 5:070, any water district seeking accreditation for an in-house course of instruction should apply for such accreditation at least 30 days prior to the performance of that instruction."

2. Case No. 2008-00191, *Northern Kentucky Water District* (Ky. PSC Nov. 7, 2008). Water district applied for accreditation of "in-house" water management training programs. The Commission decline to accredit portions of the training program because training was designed less to provide general training or information related to water system management or operation than to provide status report on the utility's operations.

3. Case No. 2009-00084, *Northern Kentucky Water District* (Ky. PSC Apr. 9, 2009). Water district applied for accreditation of "in-house" water management training programs. The Commission decline to accredit portions of the training program because training was designed less to provide general training or information related to water system

management or operation than to provide status report on the utility's operations.

4. Case No. 2010-00068, *Northern Kentucky Water District* (Ky. PSC July 13, 2010). Water district applied for accreditation of "in-house" water management training programs. The Commission decline to accredit portions of the training program because training was designed less to provide general training or information related to water system management or operation than to provide status report on the utility's operations. PSC further required water district to report names of commissioners attending and the number of hours which they attended.

J. Fire Protection Service: Case No. 2007-00450, *Kentucky-American Water Company* (Ky. PSC Feb 28, 2008). Water utility petitioned for authority to discontinue fire protection service customers for non-payment. Finding that Administrative Regulation 807 KAR 5:006, Section 14, authorizes a utility to discontinue service for non-payment without specific Commission authorization, the Commission denied the petition as moot. The Commission further found that the water utility's efforts to notify these customers' insurers and local fire departments of its intent to discontinue service were prudent and reasonable and should be considered as the better practice for all water utilities that intend to discontinue a customer's fire protection service for nonpayment.

K. Connection Fees: Case No. 2006-00497, *Wood Creek Water District* (Ky. PSC June 1, 2007). The Commission approved a water district's application for a reduction of connection fee for certain wastewater collection main extensions to encourage connections and directed connection fee to terminate upon completion of the collection main.

L. Need for Attorney:

1. Case No. 2003-00312, *Fountain Run Water District No. 1* (Ky. PSC Oct. 17, 2007). Application must be signed by lawyer. Rejected application of water district for an extension of time to comply with water storage requirements set forth in 807 KAR 5:066, Section 4(4), that was submitted by a water district's engineer. Held: An attorney must submit the application for water district.

2. Case No. 2008-00513, *Rogers v. Northeast Woodford County Water District* (Ky. PSC Feb. 6, 2009). Water district's answer to formal complaint that filed with Commission was rejected because it was not signed by an attorney. Representation of a water district before the Commission, to include filing an answer to a formal complaint, constitutes the practice of law and must be performed by a licensed attorney.

3. Case No. 2010-00451, *IPGREALKY, LLC v. Kentucky-American Water Company* (Ky. PSC Dec. 6, 2010). Limited liability company may not file a complaint against utility with Commission unless the complaint is signed by an attorney. Filing a complaint constitutes the practice of law and requires a license to practice.

M. Certificate of Public Convenience and Necessity

1. Case No. 2007-00014, *Big Sandy Water District* (Ky. PSC April 3, 2007). Water district applied for a certificate of public convenience and necessity to acquire and install radio read meters. The Commission held that “[l]arge scale replacement of existing metering systems with automated meter reading equipment constitutes an extension of service that may require a certificate of public convenience and necessity.”

2. Case No. 2007-00202, *Carroll County Water District No. 1 v. Gallatin County Water District*, (Ky. PSC Sept. 15, 2008). Certificate of public convenience and necessity is required to construct facilities other than those in the ordinary course of business. KRS 278.020(1). 807 KAR 5:001, Section 9(3), provides: “No certificate of public convenience and necessity will 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 area in which the utility renders service or contiguous thereto**, 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.” A water district’s construction of facilities in the territory of another water district is not an extension in the ordinary course and requires a certificate of public convenience and necessity.

3. Case No. 2008-00119, *Northern Kentucky Water District* (Ky. PSC July 29, 2008). The Commission granted water district’s application for a certificate of public convenience and necessity for the installation of radio read meters system-wide.

4. Case No. 2008-00551, *North Marshall Water District* (Ky. PSC Mar. 30, 2009). The Commission granted water district’s application for a certificate of public convenience and necessity for the installation of automated meter reading system to replace existing meter reading system. All existing residential meters in the water district’s system will be replaced.

5. Case No. 2008-00346, *Purchase Public Service Corporation* (Ky. PSC April 3, 2009). Holding that a certificate of public convenience and

necessity should not be issued when the proposed facilities have already been construction, the Commission denied a sewer utility's application for a certificate for sewage treatment facilities that were constructed while the application was pending. It further initiated proceedings against the utility and the members of its board of directors to show cause why they should not be penalized for violating KRS 278.020(5).

6. Case No. 2007-00134, *Kentucky-American Water Company* (Ky. PSC April 25, 2008). The Commission authorized the construction of a 20 MGD water treatment plant and 30.6 miles of transmission main. Held: In determining whether water utility has capacity to provide "adequate service," utility is not required to plan for unrestricted demand in a drought of record and the Commission may consider reasonable restrictions upon water use in establishing demand projections.

7. Case No. 2009-00096, *Schimmoeller v. Kentucky-American Water Company* (Ky. PSC Nov. 24, 2009). Complainants brought formal complaint against water utility alleging, *inter alia*, that (1) Certificate should be revoked because "changed economic circumstances" may affect demand for water and eliminate need for approved facilities and (2) extended road closures constituted a material deviation from approved plans and required further commission review. Held: (1) Complaint seeking re-examination of need for facilities for which a Certificate of Public Convenience and Necessity has been issued must contain some supporting testimonial or analytical evidence to go forward. The lack of such evidence required dismissal of complaint. (2) Absent some unusual circumstance, a change in road closure period in the vicinity of approved construction, such closure does not constitute a material deviation in approved construction plans. To constitute a material deviation, the change must affect the facilities' cost, location, material compositions, or operation.

8. Case No. 2009-00238, *Grayson County Water District* (Ky. PSC Dec. 10, 2009). The Commission granted water district's application for a certificate of public convenience and necessity for the purchase and installation of 2,500 radio read meters as part of program to replace eventually all manual read meters in its system.

9. Case No. 2009-00143, *Intercounty Energy Cooperative* (Ky. PSC Dec. 23, 2009). Rural electric cooperative sought a certificate of public convenience and necessity to construct certain improvements, including automated meter reading meters. Utility did not conduct a cost-benefit analysis "because of the overall benefits recognized by many utilities across the state and nation." While granting the requested certificate, the Commission noted its preference for a cost-benefit analysis specific to the utility's program and stated that any future application for a certificate for AMR devices should contain a cost-benefit analysis and demonstrate how

the proposed expenditure will benefit the utility's system and its customers.

10. Case No. 2009-00213, *Madison County Utilities District* (Ky. PSC June 8, 2010). The Commission granted water district's application for a certificate of public convenience and necessity for the purchase and installation of 2,940 radio read meters as part of program to replace eventually all manual read meters in its system. The Commission further directed that water district, upon replacement of existing meters, continue to physically inspect and examine all meter pits and installations at least once annually and granted water district exemption from testing replaced meters.

N. PSC Appointment of Water District Commissioners

1. Case No. 2007-00036, *Lyon County Water District* (Ky. PSC Aug. 29, 2007). County Judge/Executive petitioned Commission to appoint his nominee to water district's board of commissioners. Finding that "reappointment of an experienced, proven commissioner constitutes the most reasonable and expeditious resolution to the current impasse," the Commission denied petition and instead reappointed current officeholder.

2. Case No. 2007-00200, *Lyon County Water District* (Ky. PSC Aug. 29, 2007). County Judge/Executive petitioned Commission to appoint his nominee to water district's board of commissioners. Finding that "reappointment of an experienced, proven commissioner constitutes the most reasonable and expeditious resolution to the current impasse," the Commission denied petition and instead reappointed current officeholder.

3. Case No. 2007-00493, *Breathitt County Water District* (Ky. PSC Mar. 20, 2008). Members of Fiscal Court requested the PSC to appoint their nominees after Fiscal Court rejected County Judge/Executive's nominees. County Judge/Executive subsequently applied for appointment of his nominees. While application was pending before the Commission, County Judge/Executive and Fiscal Court reached agreement upon appointment and submitted agreement to PSC for action. Appointing the nominees upon whom the County Judge/Executive and Fiscal Court had agreed, the Commission noted that while a county judge/executive and a county fiscal court may reach agreement on the vacant position, they lack authority to fill the vacancy once it has remained unfilled for more than 90 days. Any action on their part to appoint and approve a candidate at that time has limited legal effect and constitutes only a recommendation to the Commission. While noting that it has exclusive authority to fill vacancies that exist for 90 days or more, the Commission stated that it will defer to

the local elected officials in those instances where the local appointing and approval authorities have reached agreement on a candidate. Absent unusual circumstances that raise clear concerns about an agreed candidate's qualifications, such deference is appropriate because local officials generally have a better understanding of the candidates' qualifications and of the water district's needs and because these officials are directly accountable to the water district's customers through the ballot box.

4. Case No. 2008-00395, *Letcher County Water District*, (Ky. PSC. Jan. 28, 2009). The Commission requested to appoint three members to water district board of commissioners after County Judge/Executive and Fiscal Court determined that existing water district commissioners had not been appointed or approved after the expiration of their original terms or had never been approved by Fiscal Court. Followed *Breathitt County Water District*, Case No. 2007-00493 (Ky. PSC Mar. 20, 2008) and appointed candidates jointly nominated by County Judge/Executive and Fiscal Court.

5. Case No. 2010-000, *Fountain Run Water District* (Ky. PSC Aug. 11, 2010). Water district board of commissioners requested PSC reappoint three members to board whose terms had expired more than four years earlier. PSC required to reconstruct terms of service for each board position to determine the remaining unexpired terms.

O. Credit Card/Debit Card/Automated Clearinghouse (ACH) Fees:

1. Case No. 2008-00171, *Caldwell County Water District* (Ky. PSC June 18, 2008). The Commission approved a fee for debit or credit card use based upon the actual cost of use to the water district.

2. Case No. 2008-00432, *South Anderson Water District* (Ky. PSC Mar. 18, 2009). The Commission approved a fee for debit or credit card use based upon the actual cost of use to the water district. Fee may not exceed the amount charged to the water district to process the credit card or debit card transaction. Customer must be advised prior to the transaction of the fee and, upon request, the formula used to calculate the amount of the fee. The Commission further approved a fee for automatic withdrawals from customer bank accounts for bill payment.

3. Case No. 2008-00317, *Ohio County Water District* (Ky. PSC Mar. 11, 2009). The Commission approved a fee for debit or credit card use based upon the actual cost of use to the water district. Fee may not exceed the amount charged to the water district to process the credit card or debit card transaction. Customer must be advised prior to the

transaction of the fee and, upon request, the formula used to calculate the amount of the fee.

4. Case No. 2008-00397, *Cannonsburg Water District* (Ky. PSC Mar. 11, 2009). The Commission approved a fee for debit or credit card use based upon the actual cost of use to the water district. Fee may not exceed the amount charged to the water district to process the credit card or debit card transaction. Customer must be advised prior to the transaction of the fee and, upon request, the formula used to calculate the amount of the fee.

P. Returned Check Fee: Case No. 2007-00194, *South 641 Water District* (Ky. PSC June 28, 2007). Held that, absent extraordinary circumstances, KRS 514.040 limits the amount that a utility may charge for passing a bad check.

Q. Free Water to Water District Commissioners.

1. Case No. 2007-00211, *West Shelby Water District* (Ky. Aug. 29, 2007). Water district requested approval to provide free water service to its commissioners. Denying application, the Commission held that requiring ratepayers to absorb the cost of free water service is unreasonable and that free service would circumvent restrictions on water district commissioner's salary.

2. Case No. 2008-00220, *Cannonsburg Water District* (Ky. PSC Mar. 10, 2009). The Commission rejected previous reasoning for denying requests for free water service to commissioners and water district employees. It discussed extensively the reasons for and against such service. The Commission noted that free service may be appropriate in special circumstances. A water district that applies for such service should provide with its application evidence regarding the level of official compensation, including: fringe benefits; the officials' workload; the size and scope of the water district's operations; the water district's past history of attracting qualified persons to serve in positions of responsibility; the cost of such service; and the effect of the provision of such service.

R. Rural Development Financing

1. Case No. 2007-00245, *Martin County Water District* (Ky. PSC July 16, 2007). When approving a water district's plan of financing of a water system improvements project that Rural Development (RD) financed, the Commission recommended that RD impose some or all of the improvements that a Commission management audit recommended as a condition to lending.

2. Case No. 2007-00385, *Rowan Water Inc.* (Ky. PSC Oct. 12, 2007). When approving a water district's plan of financing of a water system improvements project that RD financed, the Commission recommended that RD should refrain from including any rates and charges that are unrelated to proposed construction projects in its letters of conditions, especially those charges that involve customer deposits and non-recurring charges. The Commission stated that water utilities seeking review of such charges should follow the procedures set forth in Administrative Regulation 807 KAR 5:011 and that Commission review of these charges have historically been prompt and have not involved expensive or lengthy proceedings.

3. Case No. 2008-00045, *U.S. 60 Water District* (Ky. PSC Mar. 7, 2008). When approving a water district's plan of financing a water system improvements project that RD financed, the Commission recommended that RD should refrain from including any rates and charges that are unrelated to proposed construction projects in its letters of conditions. The RD Letter of Conditions required a fire hydrant fee of \$5 per month despite the water district's tariff containing provisions that disclaim any ability to provide fire protection service.

4. Case No. 2008-00052, *Mountain Water District* (Ky. PSC Mar. 12, 2008). Water district applied for approval of a rate adjustment, issuance of a certificate of public convenience and necessity, and authority to issue evidence of indebtedness as part its plan of financing for a water system improvements project involving RD financing. RD required adjustments to the utility's Line Leak Adjustment Rate. While approving the application, the Commission expressed its concern regarding the use of RD funding to subvert and circumvent the Commission's authority over a water utility's rates and recommended that RD refrain from conditioning its loans and grants upon adjustments to non-recurring rates that are unrelated to the financing of a waterworks improvement project.

5. Case No. 2008-00045, *US 60 Water District* (Ky. PSC Jun. 30, 2009). Water district sought to amend its existing rates to delete a monthly fire hydrant fee of \$5, whose assessment RD had required as a condition in a financing agreement with the water district . The Commission refrained from acting upon the proposed revision until water association had presented evidence of RD's consent to revision. It declared that KRS 278.023 prohibited the Commission from taking any action that would have prevented the water district from fulfilling its obligations under its agreement with RD. Since the hydrant fee was a condition of an agreement between RD and the water district, the Commission could not act to modify or otherwise authorize elimination of the hydrant fee before RD's consent."

6. Case No. 2009-00436, *Oldham County Water District* (Ky. PSC Dec. 9, 2009).

a. Water district applied for approval of a rate adjustment, issuance of a certificate of public convenience and necessity, and authority to issue evidence of indebtedness as part its plan of financing for a water system improvements project involving RD financing. In its application, the water district failed to list that purchase of water from a neighboring municipal utility was a viable alternative to portions of the proposed construction or that municipal utility's study found that present value of the total cost of the municipal utility serving as the water district's supplemental supply was \$5 million less than the water district's construction of the proposed improvements. In response to Commission inquiries, RD advised that the water district had not advised it of the option of purchasing water from the municipal utility, that RD had not been provided with any studies or analyses that discussed the municipal utility option, and that RD had not undertaken any review to determine whether construction of the proposed facilities was the least cost alternative.

b. Held: Notwithstanding KRS 278.020(1), KRS 278.023 requires the Commission to accept agreements between water districts and RD regarding construction projects and to issue the necessary orders to implement the terms of such agreements. Despite the lack of federal agency review of the water district's supply alternatives, KRS 278.023 does not grant the Commission any authority to modify or reject any portion of the agreement between RD and the water district.

7. Case No. 2010-00427, *McCreary County Water District* (Ky. PSC Dec. 13, 2010). Water District applies for a Certificate of Public Convenience and Necessity to construct sewage collection facilities under KRS 278.023. Proposed facilities will be financed under the terms of an agreement with Department of Army. Held: KRS 278.023 applies only to agreements between a water district or water association and the Department of Agriculture or Department of Housing and Urban Development. Agreements between water district and agencies of Department of Army (e.g., Army Corps of Engineers) do not fall within the provisions of KRS 278.023.

S. Failure to Comply With Rate Schedule

1. Case No. 2007-00275, *North Marshall Water District* (Ky. PSC Dec. 5, 2007). The Commission assessed a penalty against a water district

that failed to follow the provisions of its filed rate schedule that specified when utility bills are to be issued.

2. Case No. 2007-00092, *Water Service Corporation of Kentucky* (Ky. PSC Mar. 16, 2009). Water utility found to have assessed rates for fire protection services that were not set forth in its filed rate schedules. Finding that the water utility's assessment of these rates for more than four years after its acquisition of the water system indicated the utility's failure to review its filed tariff or make a comparison between its billing and collection practices and its filed tariff, the Commission found the violation to be willful and assessed a penalty of \$750. Despite the utility's collection of more than \$100,000 in unfiled fees, the Commission found that a refund of such fees was "not appropriate and would be counterproductive" and declined to direct a refund.

3. Case No. 2008-00484, *Ledbetter Water District* (Ky. PSC June 12, 2009). Water District acknowledged assessing rates for general service for four years that were in excess of those set forth in filed rate schedule. It contended that rates were assessed upon the mistaken belief that the Commission had accepted and approved its application for a purchased water adjustment. Commission records did not reveal that such an application was filed with the Commission. Commission accepted settlement agreement between utility, the members of its board of directors and Commission Staff that imposed a penalty of \$2,500 against the water district, but suspended it for a period of 2 years. No refunds of illegally assessed rates were required.

T. Purchased Water Adjustments

1. Case No. 2007-00316, *East Casey County Water District* (Ky. PSC Aug. 29, 2007). Water district applied for purchased water adjustment to pass through increase in the wholesale rate of its municipal supplier. Denying the application, the Commission found that the municipal supplier had not provided the Commission with the notice of any rate change that KRS 278.180 requires. The municipal supplier's rate adjustment was therefore not effective or lawful, could not be assessed, and could not serve as the basis for a purchased water adjustment.

2. Case No. 2008-00109, *Garrard County Water Association* (Ky. PSC May 15, 2008). Water district applied for purchased water adjustment to pass through increase in the wholesale rate of its municipal suppliers. Denying the application in part, the Commission found that one of the municipal suppliers had not provided the Commission with the notice of any rate change as KRS 278.180 requires. That municipal supplier's rate adjustment was therefore not effective or lawful, could not be assessed, and could not serve as the basis for a purchased water adjustment.

3. Case No. 2008-00494, *Cannonsburg Water District* (Ky. PSC Mar. 11, 2009). The Commission voided a purchased water adjustment after discovering that the utility's wholesale supplier had not placed a rate adjustment in effect as previously represented to water district.
4. Case No. 2008-00543, *Jessamine County Water District* (Ky. PSC Jan. 20, 2009). The Commission rejected a portion of water district's requested purchased water adjustment. The portion rejected related to an earlier increase from the water district's supplier. 807 KAR 5:068 required the Commission to calculate the adjustment using the difference between the supplier's current rate and most recent prior rate. As a result, both increases were not reflected in the approved adjustment.
5. Case No. 2008-00552, *Peaks Mill Water District* (Ky. PSC Jan. 22, 2009). Rather than combine components of a water district supplier's rate to determine a base rate for purposes of calculating a purchased water adjustment, the Commission found that each component should be treated individually and adjusted individually, not collectively.
6. Case No. 2008-00553, *U.S. 60 Water District* (Ky. PSC Jan. 22, 2009). Rather than combine components of a water district supplier's rate to determine a base rate for purposes of calculating a purchased water adjustment, the Commission found that each component should be treated individually and adjusted individually, not collectively.
7. Case No. 2008-00556, *North Shelby Water District* (Ky. PSC Jan. 28, 2009). Rather than combine components of a water district supplier's rate to determine a base rate for purposes of calculating a purchased water adjustment, the Commission found that each component should be treated individually and adjusted individually, not collectively.
8. Case No. 2009-00054, *Allen County Water District* (Ky. PSC May 5, 2009). Commission denied water district's application for purchased water adjustment that combined two distinct adjustments in its wholesale water provider's rate. Water district was attempting to recover an adjustment in wholesale rate that occurred on July 1, 2008 and another that was scheduled to occur on July 1, 2009. While rejecting application, the Commission advised water district that desired result could be achieved if water district filed separate applications for adjustments and increased its rate to recover the increased costs related to the first adjustment in its wholesale supplier's rate before the second adjustment in the wholesale rate became effective.

U. Free or Reduced Rate Service

1. Case No. 2007-00447, *Knox County Utility District* (Ky. PSC Dec. 20, 2007). The Commission authorized water district to waive its water connection fee to allow county government to establish an emergency source for county residents whose wells had run dry.

2. Case No. 2007-00481, *Overland Development* (Ky. PSC May 1, 2008). Water utility applied for authority to provide free water service to its employees and reduced rates for water leaks and swimming pool usage. PSC authorized free water service to employees. Finding that the utility had failed to present any arguments in support of the reduced rate for swimming pool usage and to place reasonable restrictions on its proposed leak adjustment proposal to prevent possible abuse, the Commission denied those aspects of the water utility's application.

3. Case No 2009-00090, *Grayson County Water District* (Ky. PSC. April 1, 2009). Water utility applied for authority to provide for one-time reduction in rates for customers who had water line leaks related to winter storm. Under utility's proposal, these customers would pay only the variable cost of water for all consumption during month of winter storm in excess of customer's average monthly usage. Finding that the winter storm constituted a "calamity," the Commission granted the application.

4. Case No. 2008-00220, *Cannonsburg Water District* (Ky. PSC Mar. 10, 2009). Water District requested reduced rate water service for employees and commissioners. The Commission rejected earlier decisions that held that free or reduced rate service was inappropriate because water district was non-profit entity and possessed no shareholders and stated the following policy arguments against such service: (1) It circumvented that statutory controls over water district commissioner compensation that are placed in county judge/executives and fiscal courts; (2) It has limited value as a recruiting or retention tool; (3) It reduces the transparency of a water district's payments to its commissioners; and, (4) It separates water district commissioners from other ratepayers and may undermine public confidence in the water district's governance. The Commission noted that free service may be appropriate in special circumstances. A water district that applies for such service should provide with its application evidence regarding the level of official compensation, including: fringe benefits; the officials' workload; the size and scope of the water district's operations; the water district's past history of attracting qualified persons to serve in positions of responsibility; the cost of such service; and the effect of the provision of such service on internal morale and the public's perception of the water district.

5. Case No. 2010-00035, *Breathitt County Water District* (Ky. PSC Feb. 5, 2010). Water district requested a reduced rate for emergency wholesale water service to a municipal water system whose source of supply had been disrupted by adverse winter weather. At the time of its request, the water district's rate schedule did not provide for a wholesale service rate. Noting that KRS 278.170(2) allowed the utility to provide such service immediately without prior Commission approval, the Commission approved the service for the length of the emergency.

V. Service Line Connections: Case No. 2005-00148, *Northern Kentucky Water District* (Ky. PSC July 18, 2008). Water district requested a deviation from 807 KAR 5:066, Section 12(1)(a), which places responsibility upon water utility for maintenance and ownership of service line connection from distribution main to metering point, for all connections in which meter is located inside a building. The Commission held that present regulation did not apply to service line connections made prior to June 7, 1992. Utility's responsibility for service line connections installed prior to June 7, 1992 extended only to the curb box, or to the curb stop if no curb box was installed. The Commission further did not extend the requirements of Section 12 to service line connections that the water utility purchased from a water system that was not subject to Commission jurisdiction at the time the service connection was installed.

W. Water District Commissioner Misconduct: Case No. 2006-00465, *Southern Madison Water District* (Ky. PSC Feb. 15, 2008). Commission investigated transactions between a water district and a member of its board of commissioners. While finding that a contract between the commissioner and the water district for the commissioner to provide inspection services to the water district represented a conflict of interest, the circumstances did not warrant removal of the commissioner. Commission stated that the better practice for all water district commissioners was to avoid any business dealings with their water districts. Commission further recommended that when a water district commissioner seeks to abstain from voting upon an issue, he should absent himself from the entire meeting or from the discussion and the vote upon which the potential conflict exists. Commission cautioned all water districts to the need to "prepare more accurate and complete minutes of their meetings to ensure a full and detailed record and to avoid unnecessary litigation or regulatory review."

X. Service to Mobile Home Parks:

1. Case No. 2007-00461, *Hardin County Water District No. 1* (Ky. PSC Aug. 14, 2008). Water district proposed revisions to its rules to place responsibility for water service to mobile home parks on the mobile park owner. Proposed revisions would transfer responsibility from the water district for providing water service and billing such service to the end-user. Finding certain provisions of proposed rule as unreasonable, including the

procedures for transferring responsibility for service to the mobile home park owner, the Commission denied the proposed revision.

2. Case No. 2009-00113, *Hardin County Water District No. 1* (Ky. PSC Oct. 22, 2010). PSC approved water district's proposed tariff revisions that would impose liability for water losses occurring within mobile home parks upon the owners of such facilities. Proposed tariff would allow for continued individual meter of mobile home park customers, but required the installation of a master meter for all water service provide to park. Park owners required to pay for all water provided to a mobile home park minus the cost of water billed to individually metered customers within the park. Mobile home park owners would be responsible for water provided to metered customers whose meters were not accessible for reading or whose metering pits were not free of contaminated water. Tariff revision prohibited water district from discontinuing water service to mobile home park for a park owner's failure to pay for service.

Y. Water District Merger: Case No. 2007-00496, *Merger of Graves County Water Districts* (Ky. PSC May 21, 2008). The Commission approved the application of four water districts in Graves County, Kentucky to merge their districts. The Commission noted that KRS 278.020(6) is not applicable to water district mergers.

Z. Intervention:

1. Case No. 2008-00427, *Kentucky-American Water Company* (Ky. PSC Apr. 9, 2009). The Commission denied a request for intervention in a general rate adjustment proceeding. It noted that only the Attorney General is the "only person to intervene as a matter of right" in a ratemaking proceeding. It further noted that the requesting party had failed to clearly identify whether he was a customer and that, to the extent the requesting party was a customer of the utility seeking the rate adjustment, the Attorney General represents his interests.

2. Case No. 2008-00563, *Water Service Corporation of Kentucky* (Ky. PSC May 6, 2009). The Commission denied a request for intervention in a general rate adjustment proceeding. It noted that only the Attorney General is the "only person to intervene as a matter of right" in a ratemaking proceeding. It further noted that the requesting party had failed to clearly identify whether he was a customer and that, to the extent the requesting party was a customer of the utility seeking the rate adjustment, the Attorney General represents his interests.

3. Case No. 2009-00197, *Kentucky Utilities Company* (Ky. PSC Oct. 30, 2009). Persons requested intervention in a certificate of public

convenience and necessity based upon their status as utility ratepayers. Held: The Attorney General is the only person who has a statutory right to intervene in a Commission proceeding. 807 KAR 5:001, Section 3(8) requires a person to demonstrate either (1) a special interest in the proceeding which is not otherwise adequately represented in the case, or (2) that intervention is likely to present issues or develop facts that will assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings. Persons requesting intervention have same interest as all other ratepayers. Absent a showing that requesting party will be affected differently than will all other utility customers, it does not have a special interest to justify intervention under 807 KAR 5:001, Section 3(8).

4. Case No. 2009-00548, *Kentucky Utilities Company* (Ky. PSC July 2, 2010). Alleging that he is “an environmentalist,” customer sought intervention in a general rate proceeding on that basis. PSC denied motion. Held: Labeling himself as an environmentalist does not provide customer with an independent right to intervene in a PSC case. “While protecting the environment is certainly an important and critical task, it is not one that has been delegated by the General Assembly to the Commission. Presenting issues that are beyond our jurisdiction, such as environmental issues, would unduly complicate and disrupt the Commission proceedings.”

5. Case No. 2010-00094, *Northern Kentucky Water District* (Ky. PSC Oct. 26, 2010). The Commission granted limited intervention to the Northern Kentucky Tea Party after finding that applicant for intervention could assist the Commission in evaluating how a proposed rate adjustment “as a result of unfunded mandates” would affect the water district’s customers. The Commission found that applicant for intervention had “not presented a unique or special interest in this proceeding that is not otherwise adequately represented.”

AA. Discovery:

1. Case No. 2005-00455, *DPI Teleconnect, LLC v. BellSouth Telecommunications, Inc.* (Ky. PSC April 7, 2009). Addressing objections to discovery requests served on a party to a Commission proceeding, the Commission held that a party to a Commission proceeding has the right to the production of any relevant information that is not privileged. “Relevant information” is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

2. Case No. 2009-00549, *Louisville Gas and Electric Company* (Ky. PSC July 30, 2010). Held that proforma adjustments contemplated by utility but not included in its application for rate adjustment are not subject to discovery where such adjustments were formulated by utility in consultation with counsel solely in anticipation of rate case.

BB. Municipal Utility Rate Adjustment – Allocation of Rate Case Expenses:

1. Case No. 2008-00250, *Frankfort Electric and Water Plant Board* (Ky. PSC. April 6, 2009). The Commission held that expenses related to cost-of-service study used to establish wholesale and retail rates should be allocated between wholesale and retail customers based upon proportion of wholesale purchases to total utility sales. PSC further held that, where rate case study is performed solely to determine a wholesale rate, the entire cost of the study may properly allocated to the wholesale customer(s). Departing from previous holdings that allowed recovery of rate case expenses through a temporary surcharge, the Commission amortized the allowable rate case expenses over a 3-year period and included the amortized portion in the wholesale rate.

2. Case No. 2009-00373, *Hopkinsville Water Environment Authority* (Ky. PSC July 2, 2010). PSC held that expenses related to cost-of-service study used to establish wholesale and retail rates should be allocated between wholesale and retail customers based upon each class's share of the municipal utility's total revenue requirement. PSC further warns all municipal utilities that costs related to rate case studies performed after the filing of a proposed adjustment may be disallowed as unreasonable since the appropriate time for performing such studies is before the filing of a proposed adjustment:

We find that the better practice in municipal rate adjustment proceedings is for the applicant to undertake and complete its cost-of-service study prior to filing notice of its proposed wholesale adjustment. Regardless of whether the municipal utility chooses to strictly adhere to the study's results, the study provides critical information regarding costs for the wholesale supplier and customer that, if widely known, is likely to result in agreement on prospective rate adjustments. . . . [I]n future proceedings where a municipal utility has failed to conduct such studies prior to the filing of its proposed rate adjustment, the additional litigation costs incurred by all parties will be a factor that will be considered in assessing the reasonableness of the costs related to an "after-filing cost-of-service study."

3. Case No. 2009-00428, *City of Greensburg* (Ky. PSC Aug. 6, 2010). PSC affirms that expenses related to cost-of-service study used to establish wholesale and retail rates should be allocated between retail and wholesale customer classes based upon each class's share of the municipal utility's total revenue requirement.

CC. Penalties Assessed:

1. Case No. 2006-00558, *Airview Utilities, LLC* (Ky. PSC April 2, 2009). The Commission assessed a penalty of \$500 against a sewer utility and each of its principal members for failing to comply with an Order limiting the use of surcharge proceedings to specific expenses. The Commission ordered \$250 of the penalty to be suspended for a year and vacated if they do not violate any provision of KRS Chapter 278 or Commission regulation or Order within the suspension period.

2. Case No. 2007-00275, *North Marshall Water District* (Ky. PSC Dec. 5, 2007). The Commission assessed a penalty of \$100 against a water district that failed to follow the provisions of its filed rate schedule that specified when utility bills are to be issued.

3. Case No. 2007-00092, *Water Service Corporation of Kentucky* (Ky. PSC Mar. 16, 2009). Water utility found to have assessed rates for fire protection services that were not set forth in its filed rate schedules. Finding that the water utility's assessment of these rates for more than four years after its acquisition of the water system indicated the utility's failure to review its filed tariff or make a comparison between its billing and collection practices and its filed tariff, the Commission found the violation to be willful and assessed a penalty of \$750. Despite the utility's collection of more than \$100,000 in unfiled fees, the Commission found that a refund of such fees was "not appropriate and would be counterproductive" and declined to direct a refund.

5. Case No. 2008-00145, *Center Ridge Water District, Inc.* (Ky. PSC Feb. 24, 2009). PSC penalized a small, privately owned water utility \$7,500 for three violations of Commission regulations, but suspended the penalty for two years. Penalty will be vacated if utility does not violated any provision of KRS Chapter 278 or Commission regulations within that time period.

6. Case No. 2008-00484, *Ledbetter Water District* (Ky. PSC June 12, 2009). Water District acknowledged assessing rates for general service for four years that were in excess of those set forth in filed rate schedule. It contended that rates were assessed upon the mistaken belief that the Commission had accepted and approved its application for a purchased water adjustment. Commission records did not reveal that such an

application was filed with the Commission. Commission accepted settlement agreement between utility, the members of its board of directors and Commission Staff that imposed a penalty of \$2,500 against the water district, but suspended it for a period of 2 years. A penalty of \$2,500 was also assessed against each member of the water district's board of commissioners, but was suspended upon the condition that each attend a water management training program that the Commission provides for each of the next 2 years. No refunds of illegally assessed rates were required.

7. Case No. 2008-00346, *Purchase Public Service Corporation* (Ky. PSC Dec. 16, 2009). The Commission initiated show cause proceedings against a non-profit corporation and its board of directors. The utility, which operated several sewage treatment facilities and which was organized and staffed through an area development district, acknowledged constructing sewage treatment facilities without prior Commission approval. The Commission agreed to close proceeding based upon utility's offer to have certain members of its board of directors attend Commission training.

8. Case No. 2009-00359, *Kentucky-American Water Company* (Ky. PSC Aug. 11, 2010). PSC accepted an offer of settlement from water utility that had twice failed to comply with PSC Order to obtain PSC approval prior to certain dividend payments. Utility offered to pay a penalty between \$2,500 and \$10,000. PSC established penalty at \$10,000.

9. Case No. 2008-00176, *City of Danville, Kentucky* (Ky. PSC Aug. 17, 2010). PSC initiated proceedings against city for increasing rates without obtaining PSC approval. City subsequently entered into agreements with its wholesale customers to refund amounts collected in excess of filed rates. PSC approved agreements, assessed a penalty of \$3,000 and suspended operation of the penalty for one year. PSC further directed that penalty be vacated, if within the one-year period, City did not further violate KRS 278.160 or KRS 278.200.

10. Case No. 2010-00142, *Elam Utility Co.* (Ky. PSC Sep. 22, 2010). PSC assessed a penalty of \$2,500 against owner of gas utility for failure to answer PSC Order directly owner to show cause why she should not be subject to penalty for failing to comply with provisions of filed tariff and why a suspended penalty should not be allowed to take effect.

DD. Discontinuance of Water Service for Failure to Pay Bill Owed to Private Sewer Utility.

1. Case No. 2009-00002, *Peaks Mills Water District* (Ky. PSC April 2, 2009). The Commission authorized a deviation from 807 KAR 5:006, Section 14, to permit a water district to discontinue water service to customers who failed to timely pay their bills for sewer service owed to a private sewer utility. Agreement between the water district and privately owned utility contained no provision for indemnification of water district for discontinuance performed in accordance with agreement.

2. Case No. 2010-00225, *Graves County Water District* (Ky. PSC June 22, 2010). The Commission authorized a deviation from 807 KAR 5:006, Section 14, to permit a water district to discontinue water service to customers who failed to timely pay their bills for sewer service owed to a private sewer utility. Agreement between the water district and privately owned utility contained no provision for indemnification of water district for discontinuance performed in accordance with agreement.

EE. Procedure for Placing Proposed Rates Into Effect:

1. Case No. 2009-00097, *Nolin RECC* (Ky. PSC Mar. 25, 2009). Utility filed an amendment to a special contract with the Commission on March 2, 2009 to reduce a rate effective on and after March 1, 2009. Twenty-four days later the Commission issued an Order shortening the notice period pursuant to KRS 278.180(2) to one day and permitting the rate to become effective on March 3.

2. Case No. 2009-00041, *City of Burkesville* (Ky. PSC Mar. 20, 2009). Municipal utility notified the Commission of proposed adjustment in wholesale rate. Tariff sheet which set forth the revised rate stated a proposed effective date that was earlier than the date on which sheet was filed with the Commission. Ninety-eight days after submission of tariff sheet, the Commission initiated an investigation into reasonableness of the proposed rate. It further declared that the proposed rate had not become effective since, given the effective date on the tariff sheet, the municipal utility had not given the Commission 30 days notice of the proposed adjustment as KRS 278.180(1) required.

3. Case No. 2009-00117, *Sedalia Water District* (Ky. PSC Aug. 11, 2009). Utility applied for rate adjustment and submitted a revised tariff sheet. The Commission found that Utility's failure to submit a tariff sheet that was signed by an utility official rendered its notice of rate adjustment to the Commission ineffective. Utility found that notice requirements of KRS 278.180 had not been satisfied.

4. Case No. 2009-00262, *Northern Kentucky Water District* (Ky. PSC July 13, 2009). Utility filed a revised tariff sheet to add areas that would be subject to a surcharge. Revised tariff sheet was not signed by utility official. Held: No revision to an existing tariff may be made unless in compliance with KRS 278.180 and 807 KAR 5:011, Sections 6 and 9. 807 KAR 5:011, Section 6(4), expressly provides that a modification to an existing tariff sheet may be made by filing a revised tariff sheet in accordance with 807 KAR 5:011. As the proposed tariff sheet revision was unsigned, it did not comply with 807 KAR 5:011, Section 4, and cannot take effect.

FF. PSC Approval of Issuance of Evidences of Indebtedness:

1. Case No. 2009-00018, *Big Rivers Electric Corporation* (Ky. PSC Feb. 25, 2009). Held: KRS 278.300(8) does not require Commission approval of a utility's issuance of letters of credit when the letter of credit must be paid in full for at least five consecutive business days within each 12 month period.

2. Case No. 2010-00361, *Adair County Water District* (Ky. PSC Oct. 7, 2010). Water district applied for authorization to assume the outstanding long-term debt of a municipal utility as part of an agreement to acquire the municipal utility's water distribution assets. Held: KRS 278.300(10) does not require Commission approval of a water district's assumption of long-term debt of another utility when the lender is Rural Development and the assumption agreement does not involve the construction of any utility facilities.

GG. Offsetting Improvement Charge: Case No. 2006-00191, *Henry County Water District No. 2* (Dec. 8, 2008). Water district assessed an offsetting improvement charge to each new customer. The charge represented the cost of facility improvements necessary to restore minimum daily water pressures in the general vicinity of a potential customer's location that were detrimentally affected as a result of serving the potential customer. The Commission authorized the assessment of charge on a trial basis. Upon review of the first years of operation, the Commission found that the charge was not a system development charge and reviewed it as a non-recurring charge. The Commission further found that water district had failed to demonstrate that existing general service rates did not recover the costs associated with the distribution upgrade and improvement expenses associated with new customers and therefore had failed to demonstrate that the charge was reasonable. The Commission suggested that the water district consider assessing a system development charge based upon equity buy-in methodology.

HH. Use of Electromagnetic Flow Meters: Case No. 208-00442, *Hardin County Water District No. 1* (Ky. PSC June 17, 2009). The Commission

II. Required Utility Support of Rate Assistance Programs: Case No. 2009-00117, *Kentucky Power Co.* (Ky. PSC Aug. 19, 2009). The Commission acknowledges that it lacks the legal authority to require utilities to provide funding to their ratepayer assistance programs.

JJ. Creation of Regulatory Asset: Case No. 2008-00440, *Kentucky-American Water Co.* (Ky. PSC Aug. 26, 2009). The Commission denied water utility's request to create a regulatory asset of \$184,700 for expenses related to a water conservation and management plan and a non-revenue water program. It identified four categories of expenses that had been allowed such treatment: (1) an extraordinary, nonrecurring expense which could not have reasonably been anticipated or included in the utility's planning; (2) an expense resulting from a statutory or administrative directive; (3) an expense in relation to an industry sponsored initiative; or (4) an extraordinary or nonrecurring expense that over time will result in a saving that fully offsets the cost. The Commission found that the proposed expense did not fall within any of these categories.

KK. Non-Recurring Charge Related to Collection of Debt:

1. Case No. 2009-00221, *Bullitt Utilities, Inc. d/b/a Hunters Hollow Sewer Plant* (Ky. PSC Sep. 21, 2009). PSC denied sewer utility's request for authority to assess a fee to recover the costs associated with filing of legal action to collect unpaid sewer fees. PSC found that collection of a debt through legal processes is not a service activity and that 807 KAR 5:011, Section 10, does not authorize its recovery.

2. Case No. 2009-00185, *Farmdale Development Corporation* (Ky. PSC Sep. 21, 2009). PSC denied sewer utility's request for authority to assess a fee to recover the costs associated with filing of legal action to collect unpaid sewer fees. PSC found that collection of a debt through legal processes is not a service activity and that 807 KAR 5:011, Section 10, does not authorize its recovery.

LL. Jurisdiction

1. Case No. 2008-00086, *Bluegrass Energy Cooperative Corporation* (Ky. PSC Apr. 14, 2008). Utility applied to PSC for order declaring that a customer is liable for alleged unbilled service for which no bill was issued. Held: Until a bill is rendered and the customer disputes, a billing dispute is not ripe for decision.

2. Case No. 2009-00391, *Jackson Energy Cooperative Corporation v. Booneville Cable Vision* (Ky. PSC Nov. 2, 2009). PSC lacks jurisdiction to hear a complaint that a public utility brings against a utility customer for non-compliance with the requirements of its tariff.

3. Case No. 2009-00096, *Schimmoeller v. Kentucky-American Water Company* (Ky. PSC Nov. 24, 2009). Complainants brought formal complaint against water utility for failure to comply with encroachment permits that Kentucky Highway Department issued when constructing water facilities. Complaint dismissed for lack of jurisdiction. Held: A utility's use of state highways during the construction and installation of utility facilities does not involve "rates" or fall within the definition of "service".

4. Case No. 2009-00405, *Mountain Water District* (Ky. PSC April 12, 2010). Water district sought declaratory order on the Commission's jurisdiction over its installation and maintenance of small aeration wastewater treatment systems that served a single property and were owned by the property owner. Held: The facilities in question did not provide service to the public and therefore did not fall within the Commission's jurisdiction. The fees assessed to maintain these individual plants were also not subject to Commission jurisdiction. Failure to pay such fees could not serve as a basis to discontinue the property owner's water service.

5. Case No. 2009-00190, *Cooksey v. Bowling Green Municipal Utilities and Warren County Water District* (Ky. PSC Apr. 16, 2010). Landowner filed formal complaint against water district and municipal utility in which he requested that Commission adjust the boundary for water and sewer service that the two utility has agreed upon. The agreed boundary had bisected the Complainant's land and placed a portion of the land into the municipal utility's service area. Commission dismissed complaint for lack of jurisdiction. Held: Commission lacked jurisdiction to prescribe a municipal utility's service area and could not grant the requested relief. The Commission, however, noted that the Complainant's property was located completely within the water district's territory and that its decision did not preclude a complaint against the water district requiring the water district to extend service to all portions of the Complainant's property.

6. Case No. 2009-00247, *South Shores Water Works Company v. City of Greenup* (Ky. PSC Oct. 5, 2010). Privately-owned water company brought a formal complaint against a municipal water utility for unauthorized rate adjustments and for poor service quality. Held: Commission lacked jurisdiction over the complaint as the privately owned

and PSC-regulated utility. Based upon the holding of *City of Greenup v. Public Service Commission*, 182 S.W.3d 535 (Ky. App 2005), in the absence of a written agreement for utility service between a municipal utility and a public utility that the city's mayor has executed, a municipal utility's provision of wholesale water service to a public utility was not within Commission jurisdiction.

7. Case No. 2010-00094, *Northern Kentucky Water District* (Ky. PSC Jan. 7, 2011). Intervenor in rate adjustment proceeding argued that expenses related to water district's efforts to comply with U.S. Environmental Protection Agency's rules were unreasonable because the rules were unconstitutional. Held: PSC lacks legal authority to rule upon constitutionality of federal agency's rules.

MM. Rate Mechanisms for Specific Costs.

1. Case No. 2009-00124, *Kentucky-American Water Co.* (Ky. PSC Dec. 28, 2009). PSC had questioned water utility's use of a separate rider to recover the cost of fees to withdraw water from Kentucky River. Held: Practice is reasonable, is consistent with past PSC precedent by informing ratepayers of unique utility expenditures to governmental entities and warrants "a rare exclusion from the general rule that all expenses should be recovered through base rates."

2. Case No. 2010-00074, *South Hopkins Water District* (Ky. PSC Sep. 22, 2010). Commission on its own motion created a mechanism to permit a water district to pass through the cost of payments made to its water supplier as a result of annual audit of supplier's water costs and billed after water district had provided water service to its customers. Adjustment mechanism contained a component to ensure exact recovery of payment amounts.

NN. Customer Responsibility to Review Bill. Case No. 2009-00346, *Kentucky Utilities Co.* (Ky. PSC Feb. 5, 2010). Customer brought complaint against electric utility in which he alleged that electric utility had improperly billed him for service to outdoor lights on property adjacent to a building which he had purchased 10 years earlier. Shortly after purchase of building the complaining customer had requested that utility transfer the prior owner's account to his name, but did not request any revisions or changes to service. Charges for the outdoor lights were plainly visible on each customer billing. Held: A utility customer has the obligation to review his monthly electric bill and, if anomalous charges are found on the bill, to timely notify the utility of the inappropriate charges. Utility has no legal obligation to independently investigate the ownership status of a property when a customer requests that the account be transferred.

OO. Rate Case Issues

1. Reasonableness of Historical Test Period. Case No. 2009-00549, *Louisville Gas and Electric Company* (Ky. PSC July 30, 2010). Intervenor questioned use of historical test period to establish rates when utility's parent had announced pending sale of utility. PSC overruled the objection. Held: "[W]hen a historic test period is used for setting rates, pro forma adjustments are allowed for changes that are known and measurable. But the mere fact that a future event, such as a proposed transfer of control, which is not now measurable, may cause changes in future revenues or expenses does not render the historic test year unreliable. There will always be future events that occur well beyond the end of the test period that may have an impact on the future revenues of expenses of a utility."

2. Reasonableness of Attorney Fees: Case No. 2009-00373, *Hopkinsville Water Environment Authority* (Ky. PSC July 2, 2010). Special counsel fees found to be unreasonable. Of the requested fees of \$113,438, PSC found that only \$50,000 were reasonable. Factors that PSC considered were the number of hours billed, the nature of the work, the percentage of legal fees to total rate case expenses, and the level of legal fees compared to requested rate adjustment.

3. Depreciation Practices. Case No. 2009-00370, *Henry County Water District No. 2* (Ky. PSC Aug. 12, 2010). Commission Staff and water district agree that water district had not used useful service live recommended by National Association of Regulatory Utility Commissioners (NARUC) in calculating depreciation expense on water mains and meter installations. PSC accepts rates that are based upon recalculated depreciation expense and orders utility to use NARUC recommended service lives to calculate depreciation expense in the future.

4. Use of Slippage Factor in Future Test Period Cases. Case No. 2010-00036, *Kentucky-American Water Company* (Ky. PSC Dec. 14, 2010). Held: Slippage factor serves as an indicator of a water utility's accuracy in predicting the cost of utility plant additions and time period during which new plant will be placed into service. Commission rejects the notion that slippage factor was intended only to protect ratepayers and should never be used to increase utility plant in service.

5. Reasonableness of Professional Fees. Case No. 2010-00036, *Kentucky-American Water Company* (Ky. PSC Dec. 14, 2010). Held: Recovery of fees related to an employee's membership in a professional organization is generally appropriate and beneficial to ratepayers in those instances in which the employee's membership is required to comply with

professional licensing requirements or provides the employee access to technical training and assistance in specialized areas involving utility management or operations.

6. Charitable Donations.

a. Case No. 2010-00036, *Kentucky-American Water Company* (Ky. PSC Dec. 14, 2010). Charitable donations are deemed unreasonable expenses and should be borne by utility's shareholders, not its ratepayers.

b. Case No. 2010-00094, *Northern Kentucky Water District* (Ky. PSC Jan. 7, 2011). Water District sought to recover through rates donations made to several civic organizations. Held: Expenses are not related to the provision of utility service and should not be borne by ratepayers. Moreover, the Attorney General has long opined that the use of a water district's funds is tightly prescribed, that a water district may expend funds only in keeping with its statutory purpose or express statutory obligation, and that donations to civic organizations are not within that purpose.

7. Consolidated Tax Returns. Case No. 2010-00036, *Kentucky-American Water Company* (Ky. PSC Dec. 14, 2010). Commission rejected arguments that federal taxes for ratemaking purposes should be calculated using the consolidated return of utility's holding company parent and should instead be calculated on a stand-alone basis.

PP. Customer Disconnection – Tampering with Equipment. Case No. 2008-00502, *Johnstone v. South Anderson Water District* (Ky. PSC July 6, 2010). Customer brought complaint in which she alleged water district unlawfully terminated service. Answering complaint, water district alleged that it properly terminated service due to customer's failure to pay cost of repairing water facilities. Held: Customer had without authority opened meter box and shut off water service. These actions led to damaged facilities on water district's side of meter. Customer's actions constituted tampering. As water district's tariff permitted the assessment of costs to customers for damages related to tampering, water district may terminate service for customer's refusal to pay repair costs.

QQ. Municipal Utility Rate Case Procedure: Case No. 2010-00148, *Irvine Municipal Utilities* (Ky. PSC Sep. 10, 2010). Held: Wholesale customer's withdrawal from Commission proceeding and written notice to Commission of no objection to municipal utility's proposed rate adjustment constitutes a waiver of right to hearing set forth in KRS 278.200.

RR. Adequacy of Supply

1. Case No. 2007-00134, *Kentucky-American Water Company* (Ky. PSC April 25, 2008). The Commission authorized the construction of a 20 MGD water treatment plant and 30.6 miles of transmission main. Held: In determining whether water utility has capacity to provide “adequate service,” utility is not required to plan for unrestricted demand in a drought of record and the Commission may consider reasonable restrictions upon water use in establishing demand projections.

2. Case No. 2008-00443. *Magoffin County Water District* (Ky. PSC Dec. 1, 2010). The Commission found that water district lacked adequate supply of water because its supplier, a municipality, was unable to furnish potable water at times of severe drought. Water district ordered to develop emergency supplies of water by entering into emergency supply contracts with regional water suppliers and developing an objective standard for making purchases under those contracts. Given the water district’s limited water supply and history of water shortages, its lack of a drought mitigation plan is an unreasonable practice. Water district ordered to obtain additional sources of supply and to develop an objective standard for the purchase and use of water from alternate sources.

SS. Termination of Water Service for Failure to Pay Storm Management/Garbage Fee to Municipal Utility. Case No. 2010-00036, *Kentucky-American Water Company* (Ky. PSC Dec. 14, 2010). Water utility had agreement with city to bill for sewer, storm water management, and garbage fees. Customer payment would be allocated in following order of priority: water, storm management, garbage and sewer. Given this priority, water utility had agreed to terminate water service for storm water management and garbage fees. Held: No statutory basis for discontinuing water service for failure to pay storm water management or garbage fees presently exists. 807 KAR 5:006, Section 14, prohibits a water utility from discontinuing water service for non-payment of any debts but those owed for water service received at the current place of delivery. While a water utility may request a deviation from 807 KAR 5:006, the water utility had not sought or been granted a deviation. In the absence of such deviation, water utility should discontinue its current practice and credit any payments towards sewer, storm water management, and garbage fees first to sewer payments.

TT. Utility’s Obligation to Inform Commission of Deadlines. Case No. 2010-00094, *Northern Kentucky Water District* (Ky. PSC Dec. 21, 2010). Held: Applicants before the Commission have a responsibility to inform the Commission of any practical or regulatory deadlines.

UU. Failure to Comply With Commission Procedural Orders Resulting in Adverse Administrative Action.

1. Case No.2010-00156, *Meeks v. Kentucky-American Water Co.* (Ky. PSC Feb. 2, 2011). Commission dismisses complaint after complainant fails to respond to Commission Order.

2. Case No. 2009-00417, *Atmos Gathering Company* (Ky. PSC Feb. 10, 2011). Commission dismisses application for failure to comply with Commission Staff request for information.

3. Case No. 2010-00476, *Water Service Corporation* (Ky. PSC Mar. 4, 2011). Utility filed responses to discovery request in electronic form without Commission approval and without requesting leave to file electronic copies in lieu of paper copies. Commission rejected filing and advised that in future utility should seek Commission approval to deviate from Commission regulations or provisions in Commission Orders.

VI. Public Service Commission Staff Opinions

A. Staff Opinion 2009-006 – Boone County Water District (Jul. 14, 2009). Commission Staff opined that a water district is not required to discontinue water service to a customer who fails to pay an assessment to a sanitation district for an extension of a sanitary works. It opined that KRS 220.510(1) did not require the discontinuance of water service.

B. Staff Opinion 2011-005 – Boone County Water District and Northern Kentucky Water District (Mar. 21, 2011). Commission Staff opined that KRS 220.510(1) requires a water district to discontinue water service to a customer when sanitation district requests discontinuance due to customer's failure to pay a storm water management fee owed to sanitation district.

VII. Other Regulatory Events of Note

A. State Auditor released an update of her "Recommendations for Public and NonProfit Boards" to include lessons learned from her audits of Lexington Bluegrass Airport, Kentucky Association of Counties, and Kentucky League of Cities.

B. State Auditor completed and released an audit of Mountain Water District and of its contract for Utilities Management Group to operate the water district's water and sewer facilities.

C. Finance and Administration Cabinet issued 200 KAR 5:400 on September 14, 2010. Regulation implements KRS 45A.494, which creates Kentucky's resident bidder reciprocal preference.

VIII. Public Service Commission – Cases To Watch

- A. Charges for payment of utility bills through a water district's website: Case No. 2010-00459, *Hardin County Water District No. 1*.
- B. Customer's liability for water service charges when water service available but no water is taken: Case No. 2010-00045, *Gupton v. Todd County Water District*
- C. Non-recurring charge cases – enhanced scrutiny.
- D. Municipal utility passthrough of a wholesale supplier's temporary rate adjustments pending final Commission action on proposed rate.
- E. Commission review of Mountain Water District's Contract with Utility Management Group.

IX. Public Service Commission – Other Changes

- A. Personnel Changes:
 - 1. Appointment of Commissioner Charles R. Borders (Term ending June 30, 2013).
 - 2. Deputy Executive Director David Samford and Financial Analysis Division Director Wayne Miller resigned July 5, 2010.
 - 3. Aaron Greenwell appointed Deputy Executive Director for Internal Operations.
 - 4. Stephanie Bell appointed Deputy Executive Director for External Affairs.
 - 5. John Rogness appointed Director of Financial Analysis Division.
- B. Administrative Regulation Review. The Commission is currently reviewing its administrative regulations related to the provision of water service. These include: 807 KAR 5:066; 807 KAR 5:067; 807 KAR 5:068; 807 KAR 5:069; 807 KAR 5:070; and 807 KAR 5:090.
- C. Revised Alternative Rate Filing Regulation (Anticipated Release of draft to Stakeholders – April 1, 2011).
- D. Administrative Regulation on Municipal Utility Wholesale Rates (Anticipated release of draft to stakeholders May 15, 2011).

- E. Creation of Small Utility Division.
 - 1. PSC Response to additional appropriation in 2010-2011 budget.
 - 2. Creation of SMUD Website
 - 3. Creation of SMUD Facebook page.
- F. Electronic Initiatives
 - 1. Web-Site/Electronic Filing
 - a. Mandatory Electronic Tariff Filing (Estimated date of implementation – September 1, 2011)
 - b. Revisions to Annual Report Filing System
 - c. Website Facelift.
 - 2. Electronic Court Records
- G. Water District Commissioner Training
 - 1. New Commissioner Training
 - 2. Specialized Training (Topics/Selected Water utility officials)
- H. Municipal Utility Toolbox (2nd Edition to be released June 1, 2011)
- I. Meter Laboratory Resumed Testing of Water and Gas Meters.