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March 21, 2011

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PSC STAFF OPINION 2011-005

Re: Termination of Water Service for Nonpayment of Storm Water Fees

Gentlemen:

Commission Staff acknowledges receipt of your requests on behalf of Boone County Water District ("Boone District") and Northern Kentucky Water District ("NKWD") for an opinion on a water district's authority to terminate water service for a customer's failure to pay a charge owed to a sanitation district for storm water services.

Commission Staff understands the facts to be as follows:

Boone District, a water district organized pursuant to KRS Chapter 74, owns and operates facilities that distribute water to approximately 23,097 customers in Boone County, Kentucky.¹

NKWD, a water district organized pursuant to KRS Chapter 74, owns and operates facilities that produce and distribute water to approximately 80,386 customers in Boone, Campbell, Kenton and Pendleton counties, Kentucky.²

¹ *Annual Report of Boone County Water District to the Kentucky Public Service Commission for the Calendar Year Ended December 31, 2009 at 5, 27.*

² *Annual Report of Northern Kentucky Water District to the Kentucky Public Service Commission for the Calendar Year Ended December 31, 2009 at 5, 27.*

Sanitation District No. 1 of Northern Kentucky ("SDNK1"), a sanitation district organized pursuant to KRS Chapter 220, owns and operates facilities that provide wastewater and storm water services to Boone, Campbell and Kenton Counties. Pursuant to KRS 220.030(6), SDNK1 has the responsibility to develop and implement plans for the collection and disposal of storm water drainage. Pursuant to several interlocal agreements, SDNK1 has assumed and exercises responsibility for management of storm water in Boone, Campbell and Kenton Counties. This responsibility involves the operation and management of storm water collection systems, the development and implementation of a program of regulation to control storm water runoff, and public education and outreach programs.

As water districts, Boone District and NKWD are subject to Commission jurisdiction.³ SDNK1 is not subject to Commission jurisdiction.⁴

In 2003 SDNK1 established a storm water fee to fund its storm water management program. This fee applies to all improved properties, with the exception of properties classified as agricultural and public roadways. The basic storm water surcharge fee is based upon an impervious area rate methodology and is assessed to property owners on a monthly or quarterly basis. Residential property owners are assessed a flat fee based on one equivalent residential unit ("ERU"). An ERU is defined as 2,600 square feet of property of impervious area. Impervious areas include pavement, rooftops, driveways, parking lots, sidewalks, gravel roadways and parking lots and other hard surfaces that inhibit rainfall from readily infiltrating into soil. Owners of non-residential properties are assessed a fee based upon the total impervious area within a parcel by 2,600 square feet to determine the number of ERUs for the parcel. The current monthly rate for one ERU is \$4.44.

SDNK1 currently bills and collects for its wastewater and storm water activities. Boone District and NKWD currently discontinue water service to those customers that failed to pay for wastewater services that SDNK1 provides. KRS 220.510(1) requires this action upon receipt of written notice

³ KRS 278.015.

⁴ KRS 278.010(3)(f).

from SDNK1. SDNK1 now desires to enforce its collection of storm water surcharge fee through the same procedure.

Your letters present the following question: May Boone District and NKWD discontinue water service due to a customer's failure to pay a monthly fee owed to a SDNK1 for storm water management?

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

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

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

The regulation permits a utility to discontinue service only for nonpayment of charges for the services that it provides. The Commission has permitted deviations from this regulation only in limited circumstances.⁵

Notwithstanding this regulation, public water utilities must under certain circumstances discontinue a customer's water service when a customer fails to pay his bill for sewer service and his sewer service supplier requests discontinuance of the customer's water service. KRS 96.934 provides that a water supplier "shall discontinue water service" to a premises for a customer's failure to pay sewer service charges when the governing body of municipal sewer facilities identifies the delinquent customer and notifies the water supplier to discontinue water service. Similar statutory provisions exist for sewer construction districts,⁶ metropolitan sewer districts,⁷ and joint sewer

⁵ *Boone County Water and Sewer District*, Case No. 91-428 (Ky. PSC Apr. 4, 1991) (holding that a water and sewer district may discontinue water service for a customer's failure to pay bills incurred for sewer service that the district also provided); *Collection and Billing Practices of Privately-Owned Sewer Utilities*, Administrative Case No. 347 (Ky. PSC Jan. 9, 1995).

⁶ KRS 76.368.

⁷ KRS 76.090; KRS 76.640.

agencies.⁸ To the extent that these statutes conflict with 807 KAR 5:006, Section 14, they control.⁹

KRS 220.510(1) places a similar obligation upon public water utilities whose customers receive sewer service from a sanitation district.¹⁰ It provides in relevant part:

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

⁸ KRS 76.090; KRS 76.231(3).

⁹ *Kentucky-American Water Company*, Case No. 95-238 (Ky. PSC Jun. 30, 1995); *Hendron Water District*, Case No. 2004-00376 (Ky. PSC Dec. 12, 2004).

¹⁰ *City of Covington v. Sanitation Dist. No. 1 of Campbell and Kenton Counties*, 301 S.W.2d 885 (Ky.1957).

said municipality, person, firm, or corporation, which furnishes water to said user, that the account is paid in full, including such reasonable charge for turning off and on the water service, and that the said water service can again be provided to said user's premises. [Emphasis added.]

As noted in both requests for an opinion, the legislative history of KRS 220.510 fails to provide definitive guidance as to whether a sanitation district's right to request termination of water service extends to a user's failure to pay a storm management fee. The General Assembly amended KRS 220.510 in 1948 to provide for the termination of a user's water service.¹¹ This provision has remained virtually unchanged since then. The General Assembly, however, did not entrust to sanitation districts the responsibility for the development and implementation of "plans for the collection and disposal of storm drainage" until 1994.¹² The termination of water service provision within KRS 220.510(1), therefore, was not specifically intended by its drafters to address delinquent storm management fees.

While KRS 220.510 was not specifically intended to address the termination of water service for delinquent storm management fees, the amendment of KRS 220.030 in 1994 effectively extended that statute's coverage to such fees. KRS 220.010 defines "sanitary works" as "any works constructed by a sanitation district in accordance with the purposes of KRS 220.010 to 220.540, as set forth in KRS 220.030."¹³ By amending KRS 220.030 to declare that a purpose of a sanitation district is "[t]o develop and implement plans for the collection and disposal of storm drainage,"¹⁴ the General Assembly effectively made any fee for services resulting from a sanitation district's storm water collection sewers and other storm-management related services a rate "charged for the use of sanitary works." A user's failure to pay for such services would enable a sanitation district to request the termination of the user's water service. As the General Assembly is presumed to know the state of the law when enacting legislature,¹⁵ it must be presumed that legislature was aware of the effect of amending KRS 220.030 on the other provisions of KRS Chapter 220, including KRS 220.510.

The Kentucky Court of Appeals' decision in *Wessels Co., LLC v. Sanitation Dist. No. 1 of Northern Kentucky*, 238 S.W.3d 673 (Ky.App. 2007), supports this interpretation. In *Wessels*, property owners questioned SDNK1's legal authority to

¹¹ 1948 Ky. Acts 301-303.

¹² 1994 Ky. Acts 1718-1719.

¹³ KRS 220.010(1).

¹⁴ KRS 220.030(6).

¹⁵ See, e.g., *Button v. Hikes*, 176 S.W.2d 112, 117 (Ky. 1943), overruled by *Button v. Drake*, 195 S.W.2d 66 (Ky. 1946) ("It is presumed that the legislature is acquainted with the law; that it has knowledge of the state of it upon subjects upon which it legislates; that it is informed of previous legislation, and the construction it has received.").

assess a storm management fee. Finding that the amendment of KRS 220.030 evidenced a clear legislative intent “that among the proper functions of sanitation districts is the development and implementation of ‘plans for the collection and disposal of storm drainage,’” the Court concluded that KRS 220.510 authorized the assessment and collection of SDNK1’s fee.¹⁶ To the extent that KRS 220.510(1) authorizes the collection of a storm management fee and the fee is for “the use of sanitary works,” KRS 220.510(1) requires a water supplier to terminate water service upon SDNK1’s request for termination when the user fails to pay the fee.

In its request for an opinion, NKWD notes “the lack of a nexus between water service and storm water management” and suggests that the lack of such nexus militates against the discontinuance of water service as a means to collect delinquent storm management fees. While the courts and the legislature have permitted the discontinuance of water service for delinquent sewer bills based upon the interdependence of the services,¹⁷ such interdependence is not a legal prerequisite. See *Cassity v. City of Bowling Green*, 368 S.W.2d 318, 320 (Ky. 1963) (“We are not inclined to say that *interdependence* is necessarily a controlling factor” in permitting the termination of water service for a customer’s failure to pay garbage fee). Moreover, as a result of its amendment of KRS 220.030, the General Assembly has authorized the discontinuance of water service as a method of collecting delinquent storm management fees even if such services are not interdependent.¹⁸

Based upon the above, Commission Staff is of the opinion that KRS 220.510(1) requires Boone District and NKWD to discontinue water service due to a customer’s failure to pay a monthly fees owed to a SDNK1 for storm water management when SDNK1 provides written notice of a customer’s failure to pay storm management fees and requests the discontinuance of water service until the delinquent storm management fees are paid.

KRS 220.510(1) and 807 KAR 5:006, Section 14, are clearly in direct conflict. In such conflict, the more specific statute prevails.¹⁹ KRS 220.510(1) is the more specific statute and therefore controls. KRS 278.280(2), the statute that authorized the

¹⁶ *Wessels Co.* at 678.

¹⁷ See, e.g., *Rash v. Louisville and Jefferson County Metropolitan Sewer Dist.*, 217 S.W.2d 232, 238-239 (Ky. 1949) (“[W]e can see no reason why the Water Company under a contract with the Sewer Board may not discontinue its service to delinquent sewer users. The use of both services is interdependent.”); *City of Covington v. Sanitation Dist. No. 1 of Campbell and Kenton Counties*, 301 S.W.2d 885 (Ky.1957); KRS 96.931 (“[T]he use of water in any manner tending to contaminate it, raises a correlative public duty to provide for the proper disposition thereof according to the highest public health standards, and that such public duty includes full responsibility for paying the cost of such disposition.”).

¹⁸ See *State v. City of Miami*, 27 So.2d 118, 126 (Fla. 1946).

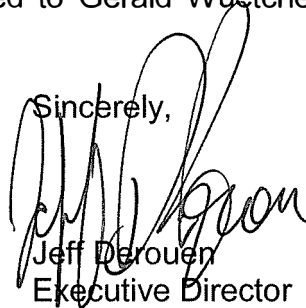
¹⁹ *Land v. Newsome*, Ky., 614 S.W.2d 948, 949 (1981) (citations omitted) (“One of the established rules of statutory construction is that when two statutes deal with the same subject matter, one in a broad, general way and the other specifically, the specific statute controls.”).

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promulgation of 807 KAR 5:006, provides only that “[t]he Commission shall prescribe rules for the performance of any service or the furnishing of any commodity of the character furnished or supplied by the utility. . . .” Moreover, while 807 KAR 5:006, Section 14, deals in general terms with the issue of discontinuance of service, KRS 220.510 specifically addresses that a public water utility's obligation to discontinue water service for a customer's failure to pay a sanitation district fees for services rendered. It states in detail the rights of both utilities and the procedures for the termination of water service.

As KRS 220.510(1) is the more specific statute and would control in any conflict with 807 KAR 5:006, Commission Staff is of the opinion that 807 KAR 5:006 does not prevent or restrict Boone District or NKWD from honoring requests for discontinuance of water service that a sanitation district makes pursuant to and in compliance with KRS 220.510(1).²⁰

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

Sincerely,

Jeff Derouen
Executive Director

Cc: Phil Trzop

²⁰ This analysis does not apply in those cases where a sanitation district requests the discontinuance of water service for a customer's failure to pay an assessment for the construction of an extension to existing sanitary works. See Letter from Jeff Derouen, Executive Director, Public Service Commission, to David A. Koenig, legal counsel for Boone Water District (Jul. 14, 2009).