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October 22, 2014

PSC STAFF OPINION 2014-012

Roger W. Hall
Williams, Hall & Latherow, LLP
P. O. Box 2008
Ashland, Kentucky 41105-2008

Re: Big Sandy Water District request for Advisory Opinion regarding free utility hookups pursuant to Deed

Dear Mr. Hall:

Commission Staff acknowledges receipt of your letter of September 23, 2014, in which you request, on behalf of the Big Sandy Water District ("Big Sandy") an Opinion regarding a provision in a deed transaction entered into between R&J Development Company, LLC ("R&J Development") and Big Sandy. This opinion represents Commission Staff's interpretation of the law as applied to the facts presented, is advisory in nature, and is not binding on the Commission should the issues herein be formally presented for Commission resolution.

Based upon your letter, Commission Staff understands the facts as follows:

You represent Big Sandy Water District. Big Sandy provides water service in portions of Boyd County, Lawrence County, and Carter County, Kentucky. Big Sandy entered into an agreement with R&J Development Company, LLC. The agreement is contained in a General Warranty Deed dated March 18, 2013, and the deed was recorded in Boyd County in Deed Book 752, Page 727. The contents of the deed include the following condition. "(4) Grantee furnish utility hookups to Grantor and its affiliates at this location without payment of any additional consideration." You indicate that R&J Development Company, LLC is now requesting Big Sandy hookup their business or businesses by providing free meters that cost between \$600 and \$1,200. You indicate that you do not know if the District can lawfully provide meters as requested by Grantor at no cost to the Grantor.

Commission Staff notes the following additional facts:

Big Sandy Water District, a water district organized pursuant to KRS Chapter 74, owns and operates facilities that distribute water to the public for compensation to 4,591 customers in Boyd, Carter, Johnson, and Lawrence counties, Kentucky.¹ KRS 278.160 requires all rates and conditions for service of Big Sandy to be on file with the Commission. The tariff provisions of Big Sandy include connection fees for residential customers receiving service through 5/8 Inch x 3/4 Inch meter and for commercial customers receiving service through 1 Inch, 1 1/2 Inch, 2 Inch, 3 Inch, and 4 Inch meters.² The connection fees are \$835.00 for a 5/8 Inch x 3/4 Inch meter; \$600.00 for a 2nd meter off an original tap (5/8 Inch x 3/4 Inch meter); and actual cost for all larger meter connections.³ The most recent revisions to Big Sandy's meter connection/tap-on charges were made pursuant to the Commission's July 14, 2009 Order in PSC Case No.2009-00069.⁴ R&J Development Company, LLC is a limited liability company organized in the state of Kentucky.⁵ On March 18, 2013, R&J Development as the grantor and Big Sandy as the grantee entered into the deed transaction for a tract of land located in Boyd County, Kentucky for a proposed water pump station location for Big Sandy. Through the transaction and per the deed, Big Sandy acquired an interest in an approximate .04 acre tract of land "lying to the east of and adjoining to KY State Route 538, Chadwick Creek near Catlettsburg, KY."⁶ A document filed with the deed and referenced in the deed as "Exhibit A" depicts the tract of land that is subject of the conveyance, and the depiction indicates that the .04 acre tract is bordered on one side by State Route 538 and bordered on three remaining sides by property owned by "R&J Development [sic] Company, LLC." Exhibit A to the deed is filed in Deed Book 752, Page 728.

Your letter presents the following question: Can Big Sandy Water District "lawfully provide meters as requested by the Grantor at no cost to the Grantor"?

¹ *Annual Report of Big Sandy Water District to the Public Service Commission for Year Ended December 31, 2013* ("Annual Report") at pages 12 and 53 of 72.

² *Big Sandy Water District Rates, Rules and Regulations for Furnishing Water Service*, P.S.C. KY. No. 1, 26th Revised Sheet No. 1; 24th Revised Sheet No. 2; 22nd Revised Sheet No. 3; 22nd Revised Sheet No. 4; 22nd Revised Sheet No. 5; and 22nd Revised Sheet No. 6.

³ *Big Sandy Water District Rates, Rules and Regulations for Furnishing Water Service*, P.S.C. KY. NO. 1, 1st Revised Sheet No. 6.

⁴ Case No. 2009-00069, *In the Matter of: Application of Big Sandy Water District to Increase Certain Nonrecurring Charges*, (Ky. PSC July 14, 2009).

⁵ *2014 Annual Report Online Filing of R&J Development Company, LLC* filed with the Kentucky Secretary of State on June 2, 2014. <https://app.sos.ky.gov/corpscans/28/0503228-06-99999-20140602-ARP-5847583-PU.pdf>, viewed on October 5, 2014.

⁶ March 18, 2014 General Warranty Deed between R&J Development and Big Sandy.

KRS 278.160(2) provides:

No utility shall charge, demand, collect, or receive from any person a greater or less compensation for any service rendered or to be rendered than that prescribed in its filed schedules, and no person shall receive any service from any utility for compensation greater or less than that prescribed in such schedules.

KRS 278.170 provides:

- (1) No utility shall, as to rates or service, give any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage, or establish or maintain any unreasonable difference between localities or between classes of service for doing a like and contemporaneous service under the same or substantially the same conditions.
- (2) Any utility may grant free or reduced rate service to its officers, agents, or employees, and may exchange free or reduced rate service with other utilities for the benefit of the officers, agents, and employees of both utilities. Any utility may grant free or reduced rate service to the United States, to charitable and eleemosynary institutions, and to persons engaged in charitable and eleemosynary work, and may grant free or reduced rate service for the purpose of providing relief in case of flood, epidemic, pestilence, or other calamity. The terms "officers" and "employees," as used in this subsection, include furloughed, pensioned, and superannuated officers and employees, and persons who have become disabled or infirm in the service of the utility. Notice must be given to the commission and its agreement obtained for such reduced rate service except in case of an emergency, in which case the commission shall be notified at least five (5) days after the service is rendered.
- (3) Upon obtaining commission approval of a tariff setting forth terms and conditions of service the commission deems necessary, a utility as defined in KRS 278.010(3)(d) may grant free or reduced rate service for the purpose of fighting fires or training firefighters to any city, county, urban-county, charter county, fire protection district, or volunteer fire protection district. Any tariff under this section shall require the water user to maintain estimates of the amount of water used for fire protection and training, and to report this water usage to the utility on a regular basis.

- (4) The commission may determine any question of fact arising under this section.

KRS 278.030(3) provides:

Every utility may employ in the conduct of its business suitable and reasonable classifications of its service, patrons and rates. The classifications may, in any proper case, take into account the nature of the use, the quality used, the quantity used, the time when used, the purpose for which used, and any other reasonable consideration.

The deed relates to a contract between R&J Development and Big Sandy,⁷ and the condition that Big Sandy furnish utility service connections is a practice that affects the rates and service of R&J Development and its affiliates to be served by the water distribution facilities of Big Sandy. Therefore, the Commission has regulatory authority to review the condition.⁸ Commission Staff notes, however, that its review of the deed between R&J Development and Big Sandy is limited to consideration of the language through which Big Sandy, as a condition of the transaction, is to furnish utility service connections to R&J Development and its affiliates at the location of the property without any payment of additional consideration. Thus, the review of the transaction is limited to a question that falls within the Commission's jurisdiction over rates and service. Commission Staff expresses no opinion as to the validity and lawfulness of any other aspect of the transaction, and the Opinion should in no way be construed as commenting upon the rights of the either Big Sandy or R&J Development under contract law or what a court might determine concerning any questions that fall outside of the Commission's jurisdiction.⁹

KRS 278.0152(1) authorizes a water utility, subject to the approval of the Commission, to make a charge or tapping fee for installing service to its customers. Pursuant to KRS 278.0152(2), "[t]he 'tapping fee' shall include charges for a service tap, meter, meter vault, and installation thereof." The tariffs of Big Sandy that are on file with the Commission contain a schedule of tapping fee charges for meter connections. For residential customers, Big Sandy is to collect \$835 for a 5/8 Inch x 3/4 Inch meter connection, \$600 for a 2nd meter connection off of an original 5/8 Inch x 3/4 Inch tap, and

⁷ See *City of Elizabethtown v. Caswell*, 261 S.W.2d 424 (Ky. 1953); see also *Yeager v. McLellan*, 177 S.W.3d 807 (Ky. 2005).

⁸ KRS 278.040(2) and KRS 278.260(1); see Case No. 2012-00152 *In the Matter of: Application of Big Sandy Water District for an Adjustment in Rates Pursuant to the Alternative Rate Filing Procedure for Small Utilities*, (Ky PSC March 8, 2013) p. 4 ("[A] contract between a utility and a customer does not limit the Commission's authority to review and adjust the rate contained in that contract."); see also *Bd. of Education of Jefferson County v. William Dohrman, Inc.*, 620 S.W.2d 328 (Ky.App. 1981)("[T]he Commission had the right and duty to regulate rates and services, no matter what a contract provided.")

⁹ See *Carr v. Cincinnati Bell*, 651 S.W.2d 126, 128 (Ky.App. 1983)("Nowhere in Chapter 278 do we find a delegation of power to the PSC to adjudicate contract claims for unliquidated damages. Nor would it be reasonable to infer that the Commission is so empowered or equipped to handle such claims consistent with constitutional requirement. Kentucky Constitution §14.").

Big Sandy is to collect the actual cost for all larger meter connections that serve commercial customers.¹⁰

“Pursuant to KRS 278.160, a utility must charge its filed rates to all customers.”¹¹ Therefore, KRS 278.160 requires Big Sandy to charge, demand, collect, or receive from R&J Development compensation for each service connection in an amount prescribed in Big Sandy’s filed schedule of rates. Your letter does not indicate the size of the meter for the meter connections sought by R&J Development. If the meter connection is for a 5/8 Inch x 3/4 Inch meter, then, per the schedule of rates, Big Sandy must collect \$835 for each service connection unless the service connection qualifies as a 2nd meter connection off of an original tap in which case Big Sandy must collect \$600. If the service connection is for a meter that is larger than a 5/8 Inch x 3/4 Inch meter, then, per the schedule of rates, Big Sandy must collect the actual cost of the connection.¹² Your letter indicates that R&J Development is requesting that Big Sandy provide “free meters that cost between \$600 and \$1,200.” Pursuant to KRS 278.0152(2), the amount of the actual cost of the meter connection shall include the cost of the service tap, meter, meter vault, and installation. Therefore, if R&J Development is requesting meters larger than a 5/8 Inch x 3/4 Inch meter, then Big Sandy must include the cost of the service tap, meter vault, and installation in addition to the cost of the meter in determining the actual cost of the service connection.

Commission Staff also notes that there is no Commission record of Big Sandy submitting the transaction with R&J Development for Commission approval as a special contract; therefore, there is no record of a Commission authorization of Big Sandy’s provision of service connections to R&J Development and its affiliates at rates that differ from those in Big Sandy’s general schedule.¹³ From PSC Staff Opinion 2012-003 that analyzes an assertion that some customers of a jurisdictional public utility were receiving “free gas” in exchange for certain rights of way”:

With regard to the issue of “free gas,” BTU’s tariff does not contain a free gas provision, nor is there any document filed with the Commission

¹⁰ *Big Sandy Water District Rates, Rules and Regulations for Furnishing Water Service*, P.S.C. KY. NO. 1, 1st Revised Sheet No. 6; and see also P.S.C. KY. No. 1, 26th Revised Sheet No. 1; 24th Revised Sheet No. 2; 22nd Revised Sheet No. 3; 22nd Revised Sheet No. 4; 22nd Revised Sheet No. 5; and 22nd Revised Sheet No. 6.

¹¹ Case No. 2005-00171, *In the Matter of: Harry Tramel, Complainant, v. Kentucky Utilities Company, Defendant*, (Ky PSC June 27, 2006) p. 4. See also *Boone County Sand and Gravel v. Owen County Rural Electric Cooperative Corporation*, 779 S.W.2d 224 (Ky.App. 1989)(upholding KRS 278.160).

¹² On June 3, 2009 and in support of its application in Case No. 2009-00069 to adjust its increase its meter connection/tap-on charges, Big Sandy filed into the record for that proceeding an amended cost justification schedule containing an itemization of expenses for providing a 5/8 Inch metered service connection. The amended cost justification schedule contains a total connection expense amount of \$835.98 which comprises material expense (\$502.13), service pipe expense (\$9.10), installation labor expense (\$122.00), installation equipment expense (\$162.50), installation miscellaneous expense (\$35.25), and administrative expense (\$5.00).

¹³ Commission Staff notes that the condition in the deed does not contain any limit on the size of the connections or the number of connections that Big Sandy is to provide.

permitting BTU to furnish any customer "free gas." BTU has never sought the Commission's approval of a lease, right of way agreement or other contract that would authorize BTU to provide natural gas service at any rate different from what is contained in BTU's filed tariff. Therefore, BTU is not authorized to provide "free gas" to any customer.¹⁴

The analysis presented in 2012-003 concerning free gas in exchange for a right of way agreement is instructive for this set of facts. Therefore, pursuant to KRS 278.160, Big Sandy is required to charge R&J Development the amount required under its schedule of rates for a meter connection or tap-on charge for each service connection. The condition in the deed through which Big Sandy is to furnish R&J Development and its affiliates with connections to the Big Sandy system without consideration is contrary to KRS 278.160 because it fails to collect compensation for a service as required under Big Sandy's filed schedules.

Commission Staff notes that the condition calls for Big Sandy to provide R&J Development and its affiliates with service connections without payment of any additional consideration. Therefore, it appears that through the condition, Big Sandy would be providing R&J Development and affiliates with free or reduced rate service. KRS 278.170 sets forth the instances in which a utility may grant free or reduced rate service, and there is no demonstration in the deed or through your September 23, 2014 letter that R&J Development and its affiliates qualify as entities eligible for reduced rate service pursuant to KRS 278.170.

Pursuant to KRS 278.170, persons eligible for free or reduced rate service include officers, agents, or employees of the utility, other utilities for the benefit of the officers, agents, and employees of both utilities, the United States, charitable and eleemosynary institutions, persons engaged in charitable and eleemosynary work, and, for the purpose of fighting fires or training firefighters, a city, county, urban-county, charter county, fire protection district, or volunteer fire district. There is no demonstration that service to R&J Development and its affiliates falls within any of the aforementioned categories. Further, except in the case on an emergency, KRS 278.170 contains the procedural requirement that a utility obtain Commission approval prior to providing free or reduced rate service. There is no demonstration that Big Sandy obtained the required Commission approval or that its agreement with R&J Development is consequent to the need to act in an emergency.¹⁵ Therefore, under the facts that you present, there is no authority for Big Sandy to provide R&J Development and its affiliates with service connections as free or reduced rate service pursuant to KRS 278.170.¹⁶ Commission Staff further notes that while the Commission has authorized

¹⁴ PSC Staff Opinion 2012-003 issued January 11, 2012.

¹⁵ See, for example, Case No. 2007-00447, *In the Matter of: Request of Knox County Utility Commission to Waive Tap Fee for Temporary Tap for Sandy Branch Area of Flat Lick*, (Ky PSC December 20, 2007).

¹⁶ See Case No. 2005,00171 *In the Matter of: Harry Tramel, Complainant, v. Kentucky Utilities Company, Defendant*, (Ky PSC June 27, 2006) p. 4 (allowing a utility to waive a tariffed minimum monthly charge would violate both KRS 278.160 and KRS 278.170).

the provision of reduced rate service by a water district in an emergency,¹⁷ the Commission has consistently determined that water districts should not be allowed to furnish free service in a non-emergency situation because they have no shareholders to which the foregone revenues can be charged.¹⁸

Pursuant to KRS 278.170, Big Sandy may not give any unreasonable preference or advantage or establish or maintain any unreasonable difference between localities for doing a like or contemporaneous service under the same or substantially the same conditions. Pursuant to KRS 278.030, Big Sandy is required to “employ in the conduct of its business suitable and reasonable classifications of its service, patrons and rates.” Commission Staff notes that an agreement through which Big Sandy provides service connections to R&J Development and its affiliates without payment of the charges that Big Sandy collects from other persons for service connections or that otherwise separates out R&J Development and its affiliates from Big Sandy’s other customers and applicants for service who are subject to Big Sandy’s service connection tariff provisions raises concerns as to unreasonable discrimination by Big Sandy that is contrary to both KRS 278.170 and KRS 278.030.

Commission Staff notes that the affiliates of R&J Development are not parties to the deed transaction. Even under the assumption that Big Sandy could demonstrate that the facts of the transaction provide an adequate basis for permitting R&J Development to obtain the preference sought through the condition in the deed, it does not appear reasonable to extend the preference to R&J Development’s affiliates, an undefined class of potential recipients who are not parties to the deed transaction.

Finally, Commission Staff notes that the Commission has determined that a water utility may not require an existing customer to provide easements for water main extensions that are unnecessary to serve that customer.¹⁹ The Commission has also determined that a water utility may not require a customer seeking service to grant a utility an easement as a condition for service when service can be provided from existing facilities without the additional easement.²⁰ Pursuant to 807 KAR 5:006, Section 6 and Commission precedent, a utility may not link its provision of service to a customer or applicant for service with the utility’s pursuit of an easement for facilities that are not

¹⁷ See Case No. 2007-00447, *In the Matter of: Request of Knox County Utility Commission to Waive Tap Fee for Temporary Tap For Sandy Branch Area of Flat Lick*, (Ky. PSC December 20, 2007).

¹⁸ See Case No. 2005-00060, *In the Matter of: Request of Bronston Water Association, Inc., to Provide Free Water Service to Churches Pursuant to KRS 278.170(2)*, (Ky. PSC October 12, 2005); Case No. 93-358, *In the Matter of: South 641 Water District Request to Provide Free Water Service*, (Ky. PSC January 3, 1994).

¹⁹ Case No. 2005-00356, *In the Matter of: Annette D. Calvert, Complainant, v. U.S. 60 Water District, Defendant*, (KY PSC June 2, 2006) p. 6; see 807 KAR 5:006, Section 6(3)(b)(2) (“A utility shall not: Refuse to provide service to a prospective or existing customer on the basis of that customer’s refusal to grant an easement for facilities that do not serve the customer.”).

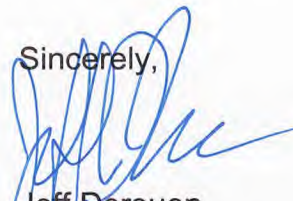
²⁰ Case No. 98-062, *In the Matter of Harold Ray Thornsbury, Complainant, v. Fleming County Water Association, Defendant*, (KY PSC June 2, 2006) pp. 2 and. 3. (“The approximate 4,500 foot easement was requested by Fleming Water to enable it to tie together two noncontiguous water mains.”).

necessary to serve that customer or applicant for service, and it offers guidance for this set of facts. As the Commission observed in Case No. 2005-00356:

Other means exist for the water utility to obtain the necessary easement. It may negotiate with the customer for the easement. If it cannot obtain the easement through negotiations, it may exercise the power of eminent domain to secure the easement.²¹

This letter represents Commission Staff's interpretation of the law as applied to the facts presented for a question that falls within the scope of the Commission's jurisdiction. As noted, Commission Staff limits its opinion to a review of the condition in the deed transaction that relates to Big Sandy's provision of free service connections. Commission Staff expresses no opinion as to the validity and lawfulness of any other aspects of the transaction which fall outside of the scope of the Commission's jurisdiction.²² 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 David Spenard, Staff Attorney, at (502) 782-2580.

Sincerely,



Jeff Derouen
Executive Director

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²¹ Case No. 2005-00356, *In the Matter of: Annette D. Calvert, Complainant, v. U.S. 60 Water District, Defendant*, (KY PSC June 2, 2006) p. 5 (footnote omitted).

²² See *Carr v. Cincinnati Bell*, 651 S.W.2d 126, 128 (Ky.App. 1983).