



Steven L. Beshear
Governor

Leonard K. Peters
Secretary
Energy and Environment Cabinet

Commonwealth of Kentucky
Public Service Commission
211 Sower Blvd.
P.O. Box 615
Frankfort, Kentucky 40602-0615
Telephone: (502) 564-3940
Fax: (502) 564-3460
psc.ky.gov

David L. Armstrong
Chairman

James W. Gardner
Vice Chairman

January 21, 2015

PSC STAFF OPINION 2015-001

Mark David Goss
Goss Samford PLLC
2365 Harrodsburg Road, Suite B-325
Lexington, Kentucky 40504

Re: Request for Advisory Opinion Regarding Commission Approval
For Transfer of Waste Water Treatment Plant.

Dear Mr. Goss:

Commission Staff acknowledges receipt of your letter of October 30, 2014, in which you request an Opinion regarding whether an agreement between the Troublesome Creek Environmental Authority, Inc. ("TEA") and the Knott County Water and Sewer District. ("KCWSD") through which KCWSD will acquire a waste water treatment facility from TEA requires Commission approval. 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 understand the facts and your legal position to be as follows:

TEA was organized as a municipal public corporation by the Judge Executives of Breathitt, Knott, and Perry Counties, Kentucky in August 2006, for the purpose of improving water quality of the Troublesome Creek watershed by constructing and operating waste water management facilities. TEA is a public utility subject to the Commission's jurisdiction under KRS Chapter 278, and TEA is authorized by the Commission to provide treatment of sewage for the public for compensation. In 2012, TEA constructed a waste water treatment plant on Ball Creek in Knott County (the "Ball Creek Plant") primarily to allow for the expansion/development of Chestnut Mountain, a residential subdivision. The development of Chestnut Mountain has not occurred, and TEA's existing customer base of twenty-eight (28) customers is insufficient to

allow TEA to financially continue operations. TEA does not have any management or operational personnel to run the Ball Creek Plant.

KCWSD is a special district formed under KRS Chapter 74 in 2003 and is regulated by the Commission pursuant to KRS Chapter 278. Pursuant to KRS 74.407, KCWSD has the statutory power to “acquire, develop, maintain and operate sewage disposal systems.” In September 2013, KCWSD and TEA entered into a Memorandum of Understanding whereby KCWSD assumed operational responsibility for the Ball Creek Plant including the responsibility to maintain the plant. KCWSD has also placed utility accounts, such as electric and telephone services, in KCWSD’s name. Since September 2013, KCWSD has used current employees at its Pippa Passes Waste Water Plant to operate the Ball Creek Plant and KCWSD’s employees have been dividing their time between the two plants.

TEA and KCWSD have entered into an agreement through which TEA will transfer ownership, maintenance, and operation of the Ball Creek Plant to KCWSD.¹ TEA will remain a viable corporate entity following the transfer and will pursue grant money to construct other waste water treatment facilities. TEA and KCWSD do not believe Commission approval is necessary for the transaction because the two sections of KRS Chapter 278 that govern transfers, KRS 278.020(5) and KRS 278.218, do not apply. Since neither ownership nor operational control of TEA is being transferred to KCWSD, KRS 278.020(5) does not apply and Commission approval is not required. Further, you state that KRS 278.218 only applies to electric facilities; therefore, KRS 278.218 would not apply. You cite a PSC Staff Opinion, dated August 20, 2004, issued to Columbia Gas of Kentucky, Inc., in support of your position.

Your letter presents the following question: Is Commission approval required for the transfer of the TEA customers and the Ball Creek Plant from TEA to KCWSD?

KRS 278.020(5) states:

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

KRS 278.020(6) states:

¹ You provide additional information regarding the transfer; however, that information will not be recited because it is not necessary to address the question that you present.

No individual, group, syndicate, general or limited partnership, association, corporation, joint stock company, trust, or other entity (an "acquirer"), whether or not organized under the laws of this state, shall acquire control, either directly or indirectly, of any utility furnishing utility service in this state, without having first obtained the approval of the commission. Any acquisition of control without prior authorization shall be void and of no effect. As used in this subsection, the term "control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a utility, whether through the ownership of voting securities, by effecting a change in the composition of the board of directors, by contract or otherwise. Control shall be presumed to exist if any individual or entity, directly or indirectly, owns ten percent (10%) or more of the voting securities of the utility. This presumption may be rebutted by a showing that ownership does not in fact confer control. Application for any approval or authorization shall be made to the commission in writing, verified by oath or affirmation, and be in a form and contain the information as the commission requires. The commission shall approve any proposed acquisition when it finds that the same is to be made in accordance with law, for a proper purpose and is consistent with the public interest. The commission may make investigation and hold hearings in the matter as it deems necessary, and thereafter may grant any application under this subsection in whole or in part and with modification and upon terms and conditions as it deems necessary or appropriate. The commission shall grant, modify, refuse, or prescribe appropriate terms and conditions with respect to every such application within sixty (60) days after the filing of the application therefor, unless it is necessary, for good cause shown, to continue the application for up to sixty (60) additional days. The order continuing the application shall state fully the facts that make continuance necessary. In the absence of that action within that period of time, any proposed acquisition shall be deemed to be approved.

Commission Staff notes that in Case No. 97-320,² the Commission found that Kentucky-American Water Company's ("KAW") acquisition of the assets of the Boonesboro Water Association ("Boonesboro") resulted in a transfer of ownership and control of Boonesboro and required commission approval pursuant to KRS 278.020(5) and (6). The transfer of assets from TEA to KCWSD that you describe is similar in nature to the transfer of assets from Boonesboro to KAW in Case No. 97-320.

² Case No. 97-320, *In the Matter of: The Verified Joint Application of Boonesboro Water Association, Inc. and Kentucky-American Water Company for Approval of the Transfer of the Ownership of the Assets of Boonesboro Water Association, Inc. to Kentucky-American Water*, (KY PSC Oct. 16, 1997), p. 11. Note: The text in the Commission's Oct. 16, 1997 Order cites "KRS 278.020(4) and (5)"; however, these subsections were renumbered as KRS 278.020(5) and (6), effective July 13, 2004. See, for background, Ky Acts 2004, c 75, §1.

In Case No. 97-320, Boonesboro entered into an agreement to transfer to KAW all Boonesboro assets that were used to provide utility service.³ Per your letter of October 30, 2014, TEA has 28 customers.⁴ Through the transaction you describe, TEA has entered into an agreement to transfer to KCWSD TEA's 28 customers and all TEA assets used to provide utility service to TEA's 28 customers. While you indicate that TEA will continue to exist as a viable corporate entity and continue to pursue grant money to construct waste water treatment facilities in other locations, Commission Staff does not believe that this fact removes the requirement for Commission approval. In pertinent part, KRS 278.020(5) states, "[n]o person shall acquire or transfer ownership of, or control, or the right to control any utility under the jurisdiction of the commission, by **sale of assets**, transfer of stock, or otherwise (emphasis added)." When considered in context, the inclusion of the phrase "sale of assets" in describing and establishing the scope of the Commission's authority through KRS 278.020(5) manifests a clear legislative intent to subject transfers consequent to the sale of all or substantially all of the assets of a jurisdictional utility, such as the sale that you describe, to the Commission's jurisdiction.

Commission Staff has reviewed the August 20, 2004 Staff Opinion to Columbia Gas of Kentucky, Inc. ("Columbia"), which addresses the question of whether Commission approval was required for a sale of a natural gas pipeline serving 13 customers pursuant to KRS 278.485. Commission Staff believes that the transaction discussed in the August 20, 2004 Staff Opinion is distinguishable from the TEA/KCWSD transaction by virtue of the fact that Columbia was not transferring its entire customer base and the facilities to serve those customers through that transaction.⁵ Commission Staff notes that in PSC Staff Opinion 2014-013 (attached), Commission Staff expressed the opinion that Commission approval is required when a water district providing both water and sewer operations transfers its sewer operations to a municipal utility. Commission Staff believes that 2014-013 offers additional guidance as to the Commission's jurisdiction.

As TEA and KCWSD are each subject to the Commission's jurisdiction and as the transaction as described is a sale of TEA's entire utility assets and customer base within the meaning of KRS 278.020(5) and 278.020(6), prior Commission approval of the transaction is required.⁶ A filing requirement checklist specifying the documents and information required to submit a transfer application is enclosed.

³ *Id.* at p. 8.

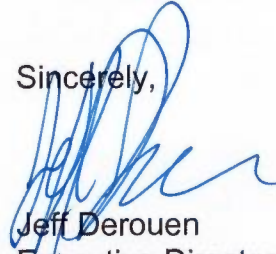
⁴ See also *Annual Report of Troublesome Creek Environmental Authority, Inc. for Year Ended December 31, 2013* ("Annual Report") at p. 36 of 44.

⁵ Commission Staff agrees that KRS 278.218 is not applicable to this set of facts because neither TEA nor KCWSD is a utility as defined under KRS 278.010(3(a)).

⁶ Commission Staff notes the TEA and KCWSD previously filed, and subsequently withdrew due to an inability to respond to data requests, an application for approval of the proposed asset transfer. See Case No. 2014-00138, Joint Application of Troublesome Creek Environmental Authority, Inc. For An Order

This letter represents the Commission Staff's interpretation of the law as applied to the facts presented. This opinion is advisory in nature and is 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

DS/kg

Enclosures:

TRANSFERS

Filing Requirements Checklist

(Applicable Authority: KRS 278.020(5) and (6) and 807 KAR 5:001, Section 14)

Case No. _____ Applicant Name _____ Received Date _____ Form Circulation Date _____

Instructions:

- 1) Each division noted by checkmark () is to complete its review and pass on within two days of receipt.
- 2) This form is to list only the specific filing deficiencies as identified in the regulations. If additional information is needed, an information request must be issued.
- 3) Staff member should use initials and list date review is completed.
- 4) Return to Docket Section following review by all divisions.

Reviewed by following Divisions: Date Staff Member

_____ Filings _____

_____ Legal _____

Division Responsible	Law/Regulation	Filing Requirement	Requirement Met		Waiver Requested		Approve Waiver?	
			Yes	No	Yes	No	Yes	No
Filings	KRS 278.020(6)	Application verified by oath or affirmation.						
	<u>807 KAR 5:001:</u>							
Filings	Section 14(1)	Full name, mailing address, and e-mail address of applicant and a reference to KRS 278.020(5) or KRS 278.020(6) or both.						
Filings	Section 7(1)	The application and 10 copies.						
Legal	Section 4(3)	Paper signed by submitting party or attorney.						
Legal	Section 4(3)	Name, address, telephone number, fax number, and e-mail address of submitting party or attorney.						

Division Responsible	Law/Regulation	Filing Requirement	Requirement Met		Waiver Requested	Approve Waiver?	
			Yes	No		Yes	No
Legal	Section 4(10)	Has submitting party redacted – - All social security numbers - All birthdates - All financial account numbers - All other personal identification information					
Legal	Section 14(2)	If applicant is a corporation, the applicant shall identify in the application the state in which it is incorporated and the date of its incorporation, attest that it is currently in good standing in the state in which it is incorporated, and, if it is not a Kentucky corporation, state whether it is authorized to transact business in Kentucky.					
Legal	Section 14(3)	If applicant is a limited liability company, the applicant shall identify in the application the state in which it is organized and the date on which it was organized, attest that it is in good standing in the state in which it is organized, and, if it is not a Kentucky limited liability company, state whether it is authorized to transact business in Kentucky.					
Legal	Section 14(4)	If applicant is a limited partnership, a certified copy of the limited partnership agreement and all amendments, or a written statement that its partnership agreement and all amendments have been filed with the Commission in a prior proceeding and a reference to the case number of that proceeding.					

The following is a checklist of items which are not required to be filed with an Application for Transfer but which ideally should be filed with an application to expedite review of the application:

Legal		1. Signed Purchase/Sale Agreement, or other writing memorializing the terms of transfer.					
Legal		2. If a sewer, the buyer must have a 3rd party beneficiary agreement or other evidence of financial integrity deemed sufficient by the PSC.					
Legal	KRS 278.020(5)	3. The names and qualifications of operating personnel, and any other evidence to show new owners have financial, technical, and managerial abilities to operate system, e.g. income tax records, financial statements, etc.					

Steven L. Beshear
Governor

Leonard K. Peters
Secretary
Energy and Environment Cabinet



Commonwealth of Kentucky
Public Service Commission
211 Sower Blvd.
P.O. Box 615
Frankfort, Kentucky 40602-0615
Telephone: (502) 564-3940
Fax: (502) 564-3460
psc.ky.gov

David L. Armstrong
Chairman

James W. Gardner
Vice Chairman

Linda Breathitt
Commissioner

October 23, 2014

Mr. Michael Eaves
218 West Main Street
P.O. Box 300
Richmond, KY 40476

Re: Irvine Municipal Utilities
Request for an Advisory Opinion

PSC STAFF OPINION 2014-013

Dear Mr. Eaves:

Commission Staff acknowledges receipt of your September 26, 2014 letter in which you request an opinion concerning the Commission's jurisdiction over a proposed asset transfer between Estill County Water District No. 1 ("Estill District") and Irvine Municipal Utilities ("Irvine Utilities"). 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 and the included Memorandum Settlement Agreement ("Settlement Agreement"), Commission Staff understands the facts as follows:

In 2005 Estill County and the City of Irvine adopted a plan to address deficiencies with their respective wastewater systems. In 2009 Estill District and Irvine Utilities entered into a joint agreement for the treatment of both entities' wastewater. The parties agreed that Irvine Utilities would construct and operate a treatment plant, to which Estill District would send its wastewater.

Subsequent to the construction of the new treatment facility, a dispute arose regarding Estill District's obligation to divert all wastewater to the new treatment facility as well as the fee Estill District would pay to Irvine Utilities for use of the treatment facility.

Estill District and Irvine Utilities have resolved the dispute as memorialized in the Settlement Agreement. The Settlement Agreement provides that Estill District will transfer all equipment, customers, customer records, accounts receivable, lines, collection systems, pump stations and easements associated with its wastewater division to Irvine Utilities.

You have requested a legal opinion regarding whether the Commission has jurisdiction over the transfer, whether Commission approval is required and whether any other state or federal agency approval is required.

Estill District is a joint water district and sewer utility. Estill District's sewer division provides wastewater service to approximately 472 customers.¹ KRS 278.015 provides in part that, "any water district, combined water, gas, or sewer district ... shall be a public utility and shall be subject to the jurisdiction of the Public Service Commission in the same manner and to the same extent as any other utility as defined in KRS 278.010...." Thus, as a combined water and sewer district, Estill District is a utility subject to the Commission's jurisdiction.

The transfer of a regulated utility is governed by KRS 278.020, which states in part:

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

(6) No individual, group, syndicate, general or limited partnership, association, corporation, joint stock company, trust, or other entity (an "acquirer"), whether or not organized under the laws of this state, shall acquire control, either directly or indirectly, of any utility furnishing utility service in this state, without having first obtained the approval of the commission. Any acquisition of control without prior authorization shall be void and of no effect.

¹ Annual Report of Estill County Water District #1- Sewer Division to the Kentucky Public Service Commission for the Year Ended December 31, 2012 at 12.

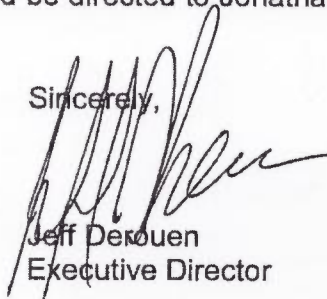
Mr. Michael Eaves
October 23, 2014
Page 3

The Settlement Agreement seeks to effectuate a transfer of Estill District's sewer division to Irvine Utilities. As Estill District is a regulated utility subject to the Commission's jurisdiction, transfers are subject to the requirements set forth within KRS 278.020. Accordingly, prior Commission approval of any transfer or acquisition is required. Estill District must submit an application to the Commission for authority to effectuate the terms of the Settlement Agreement prior to the transfer of its sewer division to Irvine Utilities. A filing requirement checklist specifying the documents and information required to submit a transfer application is enclosed.

Finally, as it is outside the scope of the Commission's jurisdiction, Commission Staff is unable to render a legal opinion as to whether any other state or federal agency may possess jurisdiction over this matter.

This letter represents Commission Staff's interpretation of the law as applied to the facts presented. This opinion is advisory in nature and is not binding on the Commission should the issues herein be formally presented for Commission resolution. Questions concerning this opinion should be directed to Jonathan Beyer, Staff Attorney, at (502) 782-2581.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeff DeRouen", is written over the typed name and title.

Jeff DeRouen
Executive Director

Enclosure