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August 21, 2015

PSC STAFF OPINION 2015-011

S2 Law, LLC
Attention: Scott Stutler
417 Helm Lane
Mt. Washington, Kentucky 40047

Re: Bullitt County Sanitation District request for Advisory Opinion regarding receivership for abandoned utility.

Dear Mr. Stutler:

Commission Staff acknowledges receipt of your August 14, 2015, request, on behalf of Bullitt County Sanitation District ("BCSD"), for an Opinion on four (4) questions regarding receivers and a receivership of an abandoned utility. 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. Commission Staff notes that the questions presented are very general in nature, and the responses provide general guidance on each topic. Commission Staff also notes that its interpretation of the law is not binding on a court.

Based upon your request, Commission Staff understand the facts as follows:

You are counsel for BCSD. Bullitt Utilities, Inc. ("Bullitt Utilities") is an entity operating in Bullitt County, Kentucky, and which provides sewer service in an area of Bullitt County known as Hunters Hollow. BCSD is concerned about a possible abandonment of the wastewater treatment facility owned by Bullitt Utilities. You believe that Bullitt Utilities has incurred substantial debt in conjunction with its operation of the Hunters Hollow plant, and the amount of debt may be in excess of \$3.0 million.

Commission Staff notes the following additional facts:

Bullitt Utilities is a for-profit Kentucky corporation that owns, controls, operates, or manages facilities used or to be used for or in connection with the collection, transmission, or treatment of sewage for the public, for compensation in Bullitt County. Bullitt Utilities is located in a county other than a county containing a city of the first class, and its treatment facility plant is not subject to regulation by a metropolitan sewer district or any sanitation district created pursuant to KRS Chapter 220. Pursuant to KRS 278.010(3)(f), Bullitt Utilities is a “utility,” and its rates and service are subject to the jurisdiction of the Kentucky Public Service Commission.¹

Bullitt Utilities is a party to two cases currently pending before the Commission. By an Order entered on May 22, 2014, the Commission opened an investigation into the issues surrounding Bullitt Utilities’ provision of wastewater treatment service.² On July 17, 2014, Bullitt Utilities filed a Petition for Certificate of Convenience and Necessity and for Surcharge.³ Both of the cases concern a catastrophic failure of the steel aeration tank at Bullitt Utilities’ Hunters Hollow wastewater treatment plant (“WWTP”) on March 29, 2014.⁴ On May 27, 2015, BCSD began accepting wastewater of the Hunters Hollow collection system pursuant to an agreement between BCSD and Bullitt Utilities.⁵

Your request presents the following questions:

¹ KRS 278.040.

² Case No. 2014-00163, *An Investigation of Existing and Future Service of Bullitt Utilities, Inc.*, (KY PSC May 22, 2014).

³ Case No. 2014-00255, *Application of Bullitt Utilities, Inc., for a Certificate of Convenience and Necessity, and Surcharge for Same*, (filed Jul. 17, 2014). Note: Bullitt Utilities did not meet the minimum filing requirements for its application until February 24, 2015.

⁴ See Case No. 2014-00255, Order (Jul. 21, 2014) at Appendix, Exhibit 4 (Kentucky Energy and Environment Cabinet, Department for Environmental Protection, Division of Water, Wastewater Inspection Report, dated Apr. 2, 2014).

⁵ See Case No. 2014-00163, Public Service Commission Letter Filing of May 28, 2015, Letter from Robert Moore, Counsel for Bullitt Utilities, to Ann Ramser, Staff Attorney, Kentucky Public Service Commission.

1. In a scenario in which a receiver is appointed for Bullitt Utilities, what is the responsibility of the receiver as it relates to the debt of Bullitt Utilities?

2. Would the receiver be obligated to use the revenues from the operation of the facility to pay those debts?

3. Would any of the liability for the debt of Bullitt Utilities be transferred to the receiver?

4. Would the receiver be strictly responsible for making sure that the plant continued to operate and would the receiver be able to use whatever revenues were generated from the plant toward that end?

KRS 278.020(5) provides:

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 278.021 provides:

(1) If the commission, after notice and hearing, enters an order in which it finds that a utility is abandoned, the commission may bring an action in the Franklin Circuit Court for an order attaching the assets of the utility and placing those assets under the sole control and responsibility of a receiver.

(2) For purposes of this section, a utility shall be considered abandoned if it:

(a) Disclaims, renounces, relinquishes, or surrenders all property interests or all rights to utility property, real or personal, necessary to provide service;

(b) Notifies the commission of its intent to abandon the operation of the facilities used to provide service;

(c) Fails to comply with an order of the commission in which the commission determined that the utility is not rendering adequate service, specified the actions necessary for the utility to render adequate service, and fixed a reasonable time for the utility to perform such actions, and the failure of the utility to comply with the order presents a serious and imminent threat to the health or safety of a significant portion of its customers; or

- (d) Fails to meet its financial obligations to its suppliers and is unable or unwilling to take necessary actions to correct the failure after receiving reasonable notice from the commission, and the failure poses an imminent threat to the continued availability of gas, water, electric, or sewer utility service to its customers.
- (3) Within twenty (20) days after commencing an action in Franklin Circuit Court, the commission shall file a certified copy of the record of the administrative proceeding in which the commission entered its finding of abandonment.
- (4) Any action brought pursuant to KRS 278.410 for review of an order of the commission containing a finding that a utility is abandoned shall be consolidated with any action brought pursuant to subsection (1) of this section and based upon the same order.
- (5) Any receiver appointed by the court shall file a bond in an amount fixed by the court. The receiver shall operate the utility to preserve its assets, to restore or maintain a reasonable level of service, and to serve the best interests of its customers.
- (6) During the pendency of any receivership, the receiver may bring or defend any cause of action on behalf of the utility and generally perform acts on behalf of the utility as the court may authorize.
- (7) The receiver shall control and manage the assets and operations of the utility until the Franklin Circuit Court, after reasonable notice and hearing, orders the receiver to return control of those assets to the utility or to liquidate those assets as provided by law.
- (8) (a) Notwithstanding subsection (1) of this section, the commission may petition the Franklin Circuit Court to appoint temporarily a receiver to operate and manage the assets of an abandoned utility. After notice to the utility and a hearing, the court may grant a petition, upon terms and conditions as it deems appropriate, upon a showing by a preponderance of the evidence:
1. That a utility has been abandoned;
 2. That the abandonment is an immediate threat to the public health, safety, or the continued availability of service to the utility's customers; and
 3. That the delay required for the commission to conduct a hearing would place the public health, safety, or continued utility service at unnecessary risk.
- (b) Sixty (60) days after its entry, the order of temporary receivership shall terminate and control and responsibility for the assets and operations of the utility shall revert to the utility without further action of the court unless the commission brings an action under subsection (1) of this section.

KRS 31A.080 provides:

(1) Receivers, except as provided in subsection (2) of this section, may be appointed under the same terms and conditions as a master Commissioner.

(2) Except for personal representatives, guardians, curators and committees for persons of unsound mind, neither a party to an action, nor his attorney, nor any person interested therein, shall be appointed as a receiver unless by agreement of the parties.

Kentucky Rule of Civil Procedure ("CR") 66 provides:

An action wherein a receiver has been appointed shall not be dismissed except by order of the court. The practice in the administration of estates by receivers or by other similar officers appointed by the court shall be in accordance with the Kentucky Revised Statutes and with the practice heretofore followed in the courts of this state. In all other respects, the action in which the appointment of a receiver is sought or which is brought by or against a receiver is governed by these rules.

Pursuant to KRS 278.020(5), Bullitt Utilities is required to obtain the prior approval of the Commission in order to abandon ownership of, or control, or the right to control the utility. Bullitt Utilities is, therefore, required to seek such an approval through a filing with the Kentucky Public Service Commission, and the issue of abandonment would be determined in an administrative proceeding. Pursuant to KRS 278.021(1), if the Commission, after notice and a hearing, enters an Order, in the administrative proceeding, in which it finds that a utility is abandoned, the Commission may then bring a judicial action in the Franklin Circuit Court for an order attaching the assets of the abandoned utility and placing those assets under the sole control and responsibility of a receiver.⁶

The role of the receiver, pursuant to KRS 278.021, includes the following:

- The receiver shall operate the utility to preserve its assets, to restore or maintain a reasonable level of service, and to serve the best interest of its customers. KRS 278.021(5);
- The receiver may bring or defend any cause of action on behalf of the utility. KRS 278.021(6);

⁶ KRS 278.021(8) provides for the authority for the Commission to petition the Franklin Circuit Court for the appointment of a temporary receiver. While the appointment process for a temporary receiver differs from the appointment process for a receiver through KRS 278.021(1), the discussion contained in this Staff Opinion is general in nature and sufficient to provide guidance as to a receiver's responsibilities, in terms of the questions you present, whether appointed pursuant to KRS 278.021(1) or KRS 278.021(8).

- The receiver may perform acts on behalf of the utility as the court may authorize. KRS 278.021(6); and
- The receiver shall control and manage the assets and operations of the utility until the Franklin Circuit Court, after reasonable notice and hearing, orders the receiver to return control of those assets to the utility or to liquidate those assets as provided by law. KRS 278.021(7).⁷

Commission Staff notes that, pursuant to KRS 278.021, a receivership is an arrangement through which the Franklin Circuit Court places the assets of a utility under the sole control and responsibility of a receiver. The receiver does not, however, become the owner of the assets or the owner of the utility. Per 278.021(7), the receiver's control and responsibility over the assets terminates upon one of two events: (1) The Court orders the receiver to return control of the assets to the utility; or (2) The Court orders the receiver to liquidate the assets as provided by law.⁸ Therefore, under the first scenario, it is clear that, although control of the assets is vested with the receiver (subject to the Court's supervision), title to the property remains with the utility, which continues to exist during the receivership. Under the latter, second scenario, although control of the assets is vested with the receiver, if the Court determines that the assets should not or cannot be returned to the utility, the receiver liquidates the assets as provided by law.⁹ Commission Staff further notes that KRS 278.021(6) states that the receiver acts on behalf of the utility. The foregoing observations support the proposition that a receiver controls the assets on behalf of the utility and does not become the owner of the assets or the owner of the utility by virtue of the receivership.

1. In a scenario in which a receiver is appointed for Bullitt Utilities, what is the responsibility of the receiver as it relates to the debt of Bullitt Utilities?

Bullitt Utilities is a Kentucky for-profit corporation. The debt of Bullitt Utilities at the time of the appointment of a receiver remains a liability of Bullitt Utilities. KRS 278.021 does not contain a provision through which the Franklin Circuit Court assigns the debt of Bullitt Utilities to the receiver at the commencement of the receivership.

KRS 278.021 does not expressly state the receiver's role regarding debt. KRS 278.021(6) authorizes the receiver to bring or defend any cause of action on behalf of the utility; therefore, if a creditor brought an action against Bullitt Utilities during the

⁷ The receiver shall also file a bond in an amount fixed by the court. KRS 278.021(5).

⁸ For a temporary receiver appointed pursuant to KRS 278.021(8), the control and responsibility for the assets terminates 60 days after the entry of the order of temporary receivership and the assets revert to the utility without further action of the Court unless the Commission brings an action under KRS 278.021(1).

⁹ In the absence of a specific set of facts regarding a scenario in which the Court orders liquidation, Commission Staff declines to express an opinion on liquidation.

pendency of the receivership, the receiver would be authorized to act to defend. KRS 278.021(6) also allows the receiver to perform acts on behalf of the utility as the Court may authorize. Therefore, the responsibility of the receiver as it relates to the debt of Bullitt Utilities depends on the extent of the authority granted by the Court. If the Order appointing the receiver contains authorization for the receiver to negotiate with creditors and make payments to creditors, then the receiver would have the authority to, while in control of the assets of Bullitt Utilities, act on behalf of Bullitt Utilities with regard to the debt. On this point, though, it is important to emphasize that the authority of the receiver to act would need to be express through an order of the Circuit Court, and the receiver might be best served by obtaining instructions of the Court through additional Orders on questions relating to the receiver's duties concerning the debt of Bullitt Utilities as such questions arise.

Commission Staff notes that there could be scenarios in which a receiver might become liable for debt based upon the actions of the receiver. For example, if a receiver executed a debt instrument or agreement relating to the debt of Bullitt Utilities in a capacity other than as receiver or in excess of the powers authorized by statute or Court orders, then the actions could raise issues as to whether the receiver, through its own conduct, has assumed or accepted liability for the debt. Of particular concern would be any arrangement by the receiver to incur additional debt or restructure debt on behalf of Bullitt Utilities. At minimum, the receiver would likely want to obtain an order of the Court authorizing the action before entering into any such arrangement. Depending on the arrangement, the receiver might also be required to obtain an approval of the Public Service Commission as well.¹⁰

2. Would the receiver be obligated to use the revenues from the operation of the facility to pay those debts?

As discussed in the response to the prior question, the receiver's responsibilities with regard to the debt of Bullitt Utilities depend upon the authority granted and instructions given to the receiver by the orders of the Franklin Circuit Court and statutes that are not within KRS Chapter 278. Commission Staff is of the view that the Franklin Circuit Court has the authority, pursuant to KRS 278.021, to authorize a receiver to utilize the revenues from Bullitt Utilities to pay the debts of Bullitt Utilities if the payments are necessary for the receiver to meet the requirements of or otherwise carry out the intent of KRS 278.021. Staff observes, nonetheless, that if the revenues of the utility operations are not sufficient to pay all costs and claims of the operations of the utility, then the receiver may want to obtain instructions, through an order of the Franklin Circuit Court, that prioritizes the application of the revenues from the operation of the facility in the event that revenue is not sufficient to meet all pending costs and claims.

3. Would any of the liability for the debt of Bullitt Utilities be transferred to the receiver?

¹⁰ See KRS 278.300.

Commission Staff notes that KRS 278.021 does not authorize the Franklin Circuit Court to transfer the debt to a receiver upon the appointment of the receiver. The debt remains a liability of Bullitt Utilities. The Court could, however, include instructions through an order as to the receiver's role in controlling the assets as it relates to the debt of Bullitt Utilities. As discussed in the response to the first question, there are scenarios in which the receiver, through its own actions, could become liable for a debt of Bullitt Utilities. The receiver is a fiduciary in possession of the assets of another party, and, as with other fiduciaries such as an executor, executrix, administrator, or administratrix, a receiver could take actions that raise issues as to whether the receiver has assumed or accepted liability for the debt. However, as noted, KRS 271.021 does not authorize the Franklin Circuit Court to transfer or assign the liability for the debt of Bullitt Utilities to a receiver as part of the appointment process. As long as the receiver acts within its capacity as receiver and within its grant of authority, by statute and Court order, Staff takes the position that the liability for the debt of Bullitt Utilities could not be involuntarily transferred to the receiver.

4. Would the receiver be strictly responsible for making sure that the plant continued to operate and would the receiver be able to use whatever revenues were generated from the plant toward that end?

KRS 278.021(5), in pertinent part, requires the receiver to "operate the utility to preserve its assets, to restore or maintain a reasonable level of service, and to serve the best interests of its customers." Staff notes that receiver would be required to use the revenue received for carrying out the duties stated in KRS 278.021. Staff notes that, per KRS 278.021(6), the receiver "may" bring or defend any cause of action on behalf of the utility. On this point, the responsibility that the receiver may exercise in terms of bringing or defending a cause of action is not strictly limited to making sure that the utility plant continues to operate.

This letter represents Commission Staff's interpretation of the law as applied to the facts presented for your questions. As noted, the opinion is advisory in nature and is not binding on the commission should the issues herein be formally presented for Commission resolution; additionally, the opinion is not binding on a Court. Questions concerning this opinion should be directed to David Spenard, Staff Attorney, at (502) 782-2580.

Sincerely,



Jeff Derouen
Executive Director

DS/ph