



Matthew G. Bevin  
Governor

Charles G. Snaveley  
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

Michael J. Schmitt  
Chairman

Robert Cicero  
Vice Chairman

Daniel E. Logsdon Jr.  
Commissioner

June 29, 2016

## **PSC STAFF OPINION 2016-014**

Transmitted via Fax and U.S. Mail

Les Moses  
Manager  
Cumberland Falls Highway Water District  
6926 Cumberland Falls Highway  
Corbin, KY 40701

Re: Request for Legal Staff Opinion

Cumberland Falls Highway Water District – Legality of 911 Fee on Water District Bills

Dear Mr. Moses,

The Commission acknowledges receipt of your May 24, 2016 letter on behalf of Cumberland Falls Highway Water District ("Cumberland Falls") requesting a staff advisory opinion to address issues relating to an ordinance passed by Whitley County Fiscal Court that imposes a 911 fee of \$3.00 per month onto water bills. This opinion 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.

Commission Staff understands the facts to be as follows: Whitley County Fiscal Court passed Ordinance No. 2016-02 ("Ordinance") that will require water utilities serving Whitley County to collect a service fee on each customer's monthly utility bill to fund 911 emergency telephone services ("911 service fee") in Whitley County, Kentucky. The Ordinance imposes a 911 service fee on active water services and directs the water utilities to collect the 911 service fee calculated at \$3.00 per active water service customer. The water utilities will collect the fee and remit amounts collected to Whitley County Fiscal Court. The 911 service fee takes effect on July 1, 2016.

You specifically request a legal opinion on the following questions:

1. Whether the imposition of a 911 service fee on water utility bills is legal.
2. Whether Cumberland Falls can terminate water service if a customer timely pays their water bill but refuses to pay the 911 service fee.
3. Whether customers who own property in Whitley County but live in another state are required to pay the 911 fee.
4. Whether Cumberland falls must charge the school tax on the \$3.00 fee.
5. Whether Cumberland falls must charge the state tax on the \$3.00 fee if the water meter is serving a business.
6. When a customer refuses to pay the 911 fee, whether the unpaid balance on the account reflecting the unpaid 911 fee is carried over to the next month.
7. Whether Cumberland Falls will need to change its tariff to include the 911 service fee.
8. Whether Cumberland Falls must provide written advance notice to its customers that the 911 service fee will be included on their water bills.
9. Whether Whitley County can reimburse Cumberland Falls for expenses arising from revising the billing computer programs to include the 911 service fee.
10. Whether a customer with more than one account in his/her name will be required to pay the 911 service fee on every water bill in his/her name.
11. Whether Cumberland Falls will have to refund the money collected under the 911 service fee if the 911 service fee is removed by Whitley County Fiscal Court shortly after Cumberland Falls begins to collect the fee.
12. If Cumberland Falls is prohibited from terminating service for nonpayment of 911 service fees, whether Cumberland Falls can collect unpaid 911 service fees before establishing new service for a customer who terminated past water service while owing unpaid 911 service fee.
13. Whether Whitley County Fiscal Court can force Cumberland Falls to add charges anytime the Whitley County Judge Executive feels the county is in need of money.

14. Whether the Whitley County Judge Executive can force Cumberland Falls to increase the 911 service fee at any time that the Judge Executive believes the fee is not sufficient to cover 911 services.

With regard to your first question, whether the Ordinance imposing the 911 service fee on water utility bills is legal, Commission Staff is unable to address that issue since it is beyond the scope of our jurisdiction under KRS Chapter 278. Commission Staff notes that there is pending litigation regarding the imposition of 911 service fees on a water meters. In October 2015, the Kentucky Supreme Court held that a fiscal court's imposition of 911 service fees on residential and commercial units within that county was a constitutional and statutorily valid exercise of the fiscal court's authority. *Greater Cincinnati/Northern Ky. Apt. Assoc. v. Campbell Co. Fiscal Court*, 479 S.W.3d 603 (2015). Prior to that decision, the Kentucky Court of Appeals found that a 911 service fee imposed by Garrard County Fiscal Court on water meters was not valid. However, in February 2016, the Kentucky Supreme Court vacated that decision and remanded that matter to the Court of Appeals for further consideration in light of *Greater Cincinnati. City of Lancaster v. Garrard County*, No. 2013-CA-000716 (Ct. App. July 3, 2014). (review granted, decision vacated Feb. 18, 2016). The Court of Appeals has not rendered a decision yet.

In regard to your second question, whether water service can be terminated if a customer refuses to pay the 911 service fee; your sixth question whether an unpaid 911 service fee is carried over to the next month on the customer's account balance; and your twelfth question whether a customer with outstanding 911 service fee indebtedness must pay the indebtedness before establishing new service, the answers depend upon the reading of the Ordinance whether the fee is imposed directly on customers, with the utility acting as a collection agent, or whether the fee is imposed upon the utility, who then passes the expense onto the customer. Here, the Ordinance is ambiguous whether the 911 service fee is imposed upon utility service, and thus the utility, or whether the 911 service fee is imposed upon the utility customer, with the utility acting merely as a collection agent. In the first paragraph on page 2 of the Ordinance, the language appears to indicate that the 911 service fee is imposed upon the utility customer and that the utility merely acts as a collection agent. However, in numbered paragraphs 1 and 2 on page 2 of the Ordinance, the 911 service fee is imposed upon "active water services," which would be indicative of a fee imposed upon a utility.

If the Ordinance is read to impose the 911 service fee upon the utility and the utility seeks to recover the expense through rates, then the provisions of 807 KAR 5:006, Section 15 would apply for termination for nonpayment; 807 KAR 5:006, Section 9(3)(h) would apply for late payment; and 807 KAR 5:006, Section 15(1)(d) applies to outstanding indebtedness. 807 KAR 5:006, Section 15(f) permits termination of service for nonpayment of charges incurred for utility service, but advance notice of termination

must be provided pursuant to that section. 807 KAR 5:006, Section 9(3)(h) provides that a utility may include in its tariff a late payment charge if a customer fails to pay a bill for services by the due date shown on the customer's bill. 807 KAR 5:006, Section 15(1)(d) provides that outstanding indebtedness must be paid before a customer owing a past due balance may establish new service.

If the Ordinance is read to impose the 911 service fee upon the customer and the utility acts merely as collection agent, then the answer is further dependent upon the remedies set forth in numbered paragraph 2 of the Ordinance, which states:

IT IS FURTHER ORDAINED that the county may enforce this fee on active water services by civil action in a court of appropriate jurisdiction. To the extent authorized by law, the county shall be entitled to recover all court costs and reasonable attorney fees incurred by it in enforcing any provision of this ordinance.

Based upon this language, the answer involves interpretation of the Ordinance, and whether the county retains exclusive enforcement authority. Because the answer involves interpretation of a county ordinance, Commission Staff is unable to address that issue because it is beyond the scope of the Commission's jurisdiction pursuant to KRS Chapter 278. If it is determined that Cumberland Falls is prohibited from disconnecting service for late payment or non-payment of the 911 service fees, that prohibition should be included in the regulated utility's tariff.

As to your third question regarding customers who own property in Whitley County but live in another state, and your fourth and fifth questions regarding the application of school and state taxes to the 911 service fee, the answers require an interpretation of a county ordinance and revenue statutes, and thus Commission Staff is unable to address those issues since they are beyond the scope of our jurisdiction under KRS Chapter 278.

In regard to your seventh question, whether Cumberland Falls will need to change its tariff to include the 911 service fee, the impact upon the filed tariff depends upon whether the Ordinance is read to impose the 911 service fee on the utility or on customers. If the Ordinance is read to impose a fee on the utility and the utility intends to collect the fee from customers as part of the utility revenue, then the fee would be a utility expense which would have to be recovered through a rate. KRS 278.010(2) defines a rate as:

[A]ny individual or joint fare, toll, charge, rental, or other compensation for service rendered by any utility, and any rule, regulation, practice, act, requirements, or privilege in any way relating to such fare, toll, charge, rental, or other

compensation, and any schedule or tariff or part of a schedule or tariff therefore.

If the fee is to be recovered through a rate, then, pursuant to Commission statutes and regulations, the utility must either pay the fee out of existing revenue or file a rate case pursuant to 807 KAR 5:001, Section 16, or alternative rate filing to increase rates pursuant to 807 KAR 5:076. If the Ordinance is read to impose a fee directly on the utility customer with the utility acting merely as a collection agent, then the utility can charge the 911 service fee without increasing existing rates, but should revise its tariff to pass through the government-imposed fee pursuant to KRS 278.160(1) and 807 KAR 5:011, which requires regulated utilities to submit a complete tariff with the Commission setting forth, among other things, the utility's rates, charges, regulations and conditions of service over which the Commission has jurisdiction.

Because the answer to your seventh question involves interpretation of a county ordinance, Commission Staff is unable to address that issue because it is beyond the scope of the Commission's jurisdiction pursuant to KRS Chapter 278.

Your eighth question is who bears responsibility for notifying Cumberland Falls customers regarding the imposition of 911 service fees. As with previous questions, the answer depends upon how the ordinance is read. If the Ordinance is read to impose the 911 service fee upon the utility and the utility seeks to pass the fee onto its customers in the form of a rate increase, then the notice requirements set forth in 807 KAR 5:001, Section 17 apply. If the Ordinance is read to impose the 911 service fee upon the customer with the utility acting merely as collection agent, then the notice requirements for a change in the tariff set forth in 807 KAR 5:011, Section 8 apply.

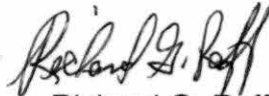
The answer to your eighth question involves interpretation of a county ordinance, and thus Commission Staff is unable to address that issue because it is beyond the scope of the Commission's jurisdiction pursuant to KRS Chapter 278.

With regard to your ninth question, whether Cumberland Falls can recover charges for reprogramming its billing program from Whitley County Fiscal Court, Commission Staff is unable to address that issue since it is beyond the scope of our jurisdiction under KRS Chapter 278.

As to your tenth question regarding how the 911 service fee is collected from customers with multiple accounts, your eleventh question regarding potential refund if the 911 service fee is terminated shortly after being implemented, your thirteenth question regarding the authority of Fiscal Court to impose additional charges, and your fourteenth question regarding the authority of the Judge Executive to increase the amount of the 911 service fee, Commission Staff is unable to address these issues because they are all beyond the scope of the Commission's jurisdiction pursuant to KRS Chapter 278.

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 Nancy Vinsel, Staff Attorney, at (502) 782-2582.

Sincerely,



Richard G. Raff  
General Counsel

NJV/ph