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July 13, 2016

PSC STAFF OPINION 2016-017

Wanda Simons Smith
Office Manager/Accountant
Laurel County Water District No. 2
3910 South Laurel Road
London KY 40744

Re: Request for Legal Staff Opinion

Laurel County Water District No. 2 –911 Fee on Water District bills

Dear Ms. Simons Smith:

The Commission acknowledges receipt of your July 5, 2016 letter on behalf of Laurel County Water District No. 2 ("District") requesting a staff advisory opinion to address issues relating to an ordinance passed by Laurel County Fiscal Court that imposes a fee of \$3.50 per month onto water bills for 911 emergency telephone service ("911 service fee"). 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: Laurel County Fiscal Court passed Ordinance No. 320.2 ("Ordinance") that will require water utilities serving Laurel County to collect a 911 service fee on each Laurel County customer's monthly utility bill to fund 911 emergency telephone services in Laurel 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 \$3.50 per active water service customer. The water utilities will collect the fee and remit amounts collected to Laurel County Fiscal Court, less a one percent (1%) administration fee. The 911 service fee took effect on July 1, 2016.

You specifically request a legal opinion on the following questions:

1. Does the District's Tariff need to be amended to legally add this fee to the water bills?
2. Is the District permitted to disconnect water service if a customer refuses to pay the 911 service fee?
3. There have been articles in the local newspapers informing the public of the 911 service fee. Was this sufficient customer notice or is the District responsible for mailing a notice to each customer?
4. According to the ordinance it appears that the \$3.50 service fee is to be billed for each apartment unit in an apartment complex or duplex. It states that each unit shall be considered an individual active water service. If the fee is not paid for each unit and there is only one meter for the apartment building, is the District permitted to disconnect water service on the one meter that supplies water to the entire building?

With regard to your first question, whether the District will need to change its tariff to include the 911 service fee, the impact upon the filed tariff depends upon whether the Ordinance imposes the fee 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 second 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, according to paragraph 6 on page 1, the Ordinance references "a service fee on water service," and paragraph 3 on page 2 of the Ordinance, states that the 911 service fee is imposed upon "active water services," both of which would be indicative of a fee imposed upon a utility.

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 could 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 customer with the District acting merely as a collection agent, then the District can charge the 911 service fee without increasing existing rates, but the District must revise its tariff to provide for the pass through of the government-imposed fee. Pursuant to KRS 278.160(1) and 807 KAR 5:011, a regulated utility is required 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 first 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 second question is whether the District is permitted to terminate water service if a customer refuses to pay the 911 service fee. The answer again depends upon the reading of the Ordinance and whether the 911 service fee is imposed upon the utility or the utility customer. If the 911 service fee is imposed upon the utility and the utility seeks to recover the expense through rates, then 807 KAR 5:006, Section 15 would apply for termination for nonpayment. 807 KAR 5:006, Section 15(1)(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.

If the 911 service fee is imposed upon the customer, then the answer depends upon whether enforcement authority is set forth in the Ordinance and, if not, whether the 911 service fee is related to providing water service. The Ordinance states that every water utility in Laurel County "shall collect" the 911 service fee, but is otherwise silent whether the county retains enforcement authority or whether enforcement authority is delegated to Laurel County water utilities. If enforcement authority is delegated to the water utilities, water service provided by a water district may be terminated only for nonpayment of charges incurred for utility service, under 807 KAR 5:006, Section 15(1)(f), or nonpayment of charges for sewer service, under KRS 74.406. Sewer service is not at issue, and, in Case No. 2012-00011,¹ the Commission explained that terminating service for nonpayment of charges incurred for utility service meant that a utility may discontinue service only for nonpayment of charges for services that the utility itself provides. Here, the Ordinance states that the purpose of the 911 service fee is to fund the operation of 911 emergency telephone services. Under this reading, the

¹ Case No. 2012-00011, *Jessamine County Water District No. 1 Request for Deviation from 807 KAR 5:006, Section 14(1)* (Ky. PSC June 14, 2012).

District could not terminate water service for nonpayment of the 911 service fee because the 911 service fee is not utility service provided by the District.

Ultimately, the answer to your second question regarding discontinuing water service for nonpayment of 911 service fees involves interpretation of the Ordinance. Commission Staff is unable to address that issue because interpreting a county ordinance is beyond the scope of the Commission's jurisdiction pursuant to KRS Chapter 278. If it is determined that the District is prohibited from disconnecting water service for late payment or non-payment of the 911 service fees, that prohibition should be included in the regulated utility's tariff.

Your third question regards notifying the District's customers of the 911 service fees. As with the first two 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 by proposing to increase its rates, 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 third 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.

Your fourth question is whether the District can disconnect water service to an apartment complex or duplex when there is one meter for the entire building, but one or more of the individual units fails to pay the 911 service fee. Setting aside whether it is permissible to disconnect water service for nonpayment of the 911 service fee, which is discussed above, again, the answer depends upon an interpretation of the Ordinance. The Ordinance imposes the 911 service fee on

...active water services provided to occupied households; apartments; each individual apartment unit in an apartment complex, duplex, etc. (which shall be considered an individual active water service); businesses; and agribusiness.

The duplicate reference to "apartments" followed by "each individual apartment unit in an apartment complex, duplex, etc." is ambiguous, and resolving such ambiguity is outside the scope of the Commission's authority. Of note, the District's Tariff addresses the issue of nonpayment by an individual unit in a multi-unit premises served by a single meter. Tariff Sheet No. 8, Item 15, states that customers in a multi-unit premises served by a single water meter have the option of billing the account owner for the actual water usage, with a minimum bill for each other unit, but that the account owner

is liable for all delinquent bills and charges, even for those units who receive a minimum bill. Thus, under the Tariff, it appears that the District's current practice is to terminate service in a multi-unit premises served by a single meter when a non-account owner in an individual unit fails to pay the amounts due for water service provided.

Because the answer to your fourth question regarding discontinuing water service for nonpayment of 911 service fees in a multi-unit premises served by a single meter involves interpretation of the 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 the District is not permitted to terminate water service for late payment or non-payment of the 911 service fees, that prohibition should be included in the regulated utility's tariff.

In summary, if the Ordinance is read to impose a fee on the utility, the utility can either pay the fee out of existing revenue or recover the expense through a rate. If the fee is to be recovered through a rate, then, pursuant to Commission statutes and regulations, the utility must 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.

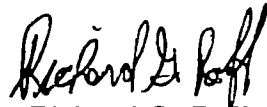
If the Ordinance is read to impose a fee directly on the customer with the District acting merely as a collection agent, then the District can charge the 911 service fee without increasing existing rates, but the District must revise its tariff to provide for the pass through of the government-imposed fee.

The discussion of the 911 service fee is limited solely to Commission Staff's opinion as to the District's tariffs. Commission Staff notes litigation is pending regarding the imposition of 911 service fees on 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 a 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 (Ky. App. July 3, 2014) (discretionary review granted, decision vacated Feb. 18, 2016). The Court of Appeals has not rendered a decision yet.

Commission Staff points to this information only as precautionary for any potential effect on 911 fees in the future; it has no present effect on the issues for which the District requested a staff opinion.

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