

**COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION**

IN THE MATTER OF:	)	
	)	
ELECTRONIC APPLICATION OF BULLITT	)	
UTILITIES, INC. FOR A SURCHARGE	)	CASE NO. 2016-00401
	)	
	)	

**RESPONSE OF BU TO THE LEGAL ISSUES IDENTIFIED  
IN THE COMMISSION’S DECEMBER 29, 2016 ORDER**

Bullitt Utilities, Inc. (“BU”), by Robert W. Keats, Chapter 7 Trustee for BU (the “Trustee”), responds to the legal issues with BU’s Surcharge Application identified in the Commission’s December 29, 2016 Order. Specifically, the Commission requested the Trustee “file a brief that supports his position that [BU] has a right under state law to request the surcharge rate.” Order, December 29, 2016, p. 22.

The Commission continued:

The brief should, at a minimum, address [BU’s] status as a “utility” (as per KRS 278.010(3)(f)), [BU’s] legal authority to file a tariff with the Commission, and [BU’s] interest in the rates collected from and obligations with respect to the service rendered to, the customers of the Hunters Hollow collection system under state law.

*Id.*

The Order directed the Trustee to file his brief regarding these legal issues by January 13, 2017.

*Id.* at 23. The Trustee will address these issues below.

**ANALYSIS**

**I. BU, THROUGH THE TRUSTEE, HAS THE RIGHT UNDER STATE LAW TO REQUEST THE SURCHARGE RATE.**

The Commission’s April 11, 2016 Order in Case No. 2015-00100 confirms BU has the right under state law to request the surcharge. PSC Staff Opinion 2015-011, which has been

previously relied on by the Trustee in Case No. 2014-00255, follows the Commission Order discussed below. A utility that has been abandoned under KRS 278.021, and for which a receiver has been appointed, remains a regulated utility subject to the Commission's jurisdiction. Usually the utility for which a receiver has been appointed will act through its receiver. The appointment of the Trustee and the September 1, 2016 Memorandum-Opinion and Order and September 26, 2016 Order entered by the Bankruptcy Court (collectively, the "BK Court Orders") clarify the Trustee acts for BU for anything related to BU's claim for a surcharge.

## **II. BU IS A UTILITY UNDER KRS 278.010(3)(f).**

The Commission recently addressed a situation similar to the issues facing BU *In the Matter of: An Investigation Of Cedar Hills Disposal Sanitation Corporation's Notice Of Intent To Abandon Service*, Case No. 2015-00100. In the Cedar Hills Abandonment Case, the Commission considered a request from the Regional Water Resource Agency (the "RWRA"), the logical and likely only candidate to be the Receiver for Cedar Hills, to set the rates for Cedar Hills as a precondition to being appointed Receiver. The Commission stated:

Accordingly, just as RWRA is exempt from Commission jurisdiction, so too would Cedar Hills be exempt upon its eventual transfer to and acquisition by RWRA. However, until RWRA fully acquires the Cedar Hills assets, RWRA merely acts as a caretaker for those assets, and Cedar Hills through its receiver remains a regulated utility subject to the Commission's jurisdiction for the duration of the receivership.

Case No. 2015-00100, Order, April 11, 2016, pp. 7-8. **Exhibit A.**

The Commission addressed the same issues *In the Matter of: An Investigation Of Friendly Park Development Inc.'s Notice Of Intent To Abandon Service*, Case No. 2015-00101, in which the RWRA made the same request and the Commission issued an identical Order on the same day.

The above analysis applies to BU and it remains a utility subject to the Commission's jurisdiction under KRS 278.010(3)(f). As a utility, BU has the right to file the Surcharge

Application as would any other utility. The above conclusions “support the proposition that a receiver controls the assets [and acts] on behalf of the utility” but is not the owner of the utility. PSC Staff Opinion 2015-011, August 21, 2015, p. 6. **Exhibit B**. The difference between Cedar Hills, Friendly Park Development and most other utilities for which a receiver is appointed and BU is those utilities do not also have a trustee appointed by a Bankruptcy Court.

**III. THE COMMISSION’S CITATION TO *MSD v. DOUGLASS HILLS* SUPPORTS THE TRUSTEE’S ABILITY TO FILE BU’S SURCHARGE APPLICATION.**

The Commission cites *Louisville & Jefferson County Metropolitan Sewer District v. Douglas Hills Sanitation Facility*, 592 S.W.2d 142, 149-50 (Ky. 1979) for the proposition that legal title to a sewer collection system “has very little practical significance.” Order at 22. MSD was a case in which the title holder to the property had given or granted rights so broad to make ownership of the sewer system insignificant.

Determining those assets owned by BU was important to define BU’s Bankruptcy Estate and BU’s assets subject to control by the Trustee or the BCSD, as BU’s Receiver. The Commission acknowledges “the control over the assets of [BU] by the Trustee has been comprehensively addressed by the Bankruptcy Court.” Order at 21. As in MSD, ownership alone does not give BU unfettered control over its assets. The principles of MSD apply to this case as a limitation on BU’s ability to act. BU may only act through the Trustee or the BCSD. The “Trustee is entitled to assert control over the Debtor’s chose in action, the Surcharge Claim, before the Public Service Commission or otherwise.” Bankruptcy Case, Order, September 26, 2016, p. 2, ¶2 (part of **Exhibit F** to BU’s Surcharge Application).

The BK Court Orders confirm the Trustee may file this Surcharge Application for BU. The Commission “Staff stated that BCSD, as receiver, has the power to make decisions regarding the pending application for a surcharge,” which included the right to re-file BU’s

Surcharge Application if the BCSD deemed appropriate. PSC Case 2014-00255, October 28, 2015 Informal Conference Memo, p. 2. **Exhibit C**. The Commission's December 15, 2015 Order in Case No. 2014-00255 dismissed BU's previous surcharge case without prejudice. The BK Court Orders transfer control of the "Surcharge Claim" from the BCSD, as Receiver, to the Trustee.

**IV. BU HAS THE LEGAL AUTHORITY TO FILE A TARIFF WITH THE COMMISSION.**

The BK Court Orders confirm BU, by the Trustee, may file a Tariff with the Commission as necessary to pursue BU's Surcharge Application. There is no legal difference in the Trustee filing revisions to BU's existing Tariff for the charges sought by this Surcharge Application than for the BCSD to file BU's current Tariff (**Exhibit Q** to BU's Surcharge Application). BU's current Tariff was filed by the BCSD as Receiver for BU and was issued by Jerry Kennedy, the BCSD's District Manager.

**V. THE RATES COLLECTED FROM BU'S CUSTOMERS WILL BE DIVIDED BETWEEN OPERATIONS AND THE SURCHARGE.**

The Trustee envisions any surcharge collected from BU's customers will be subject to distribution under the jurisdiction of the Bankruptcy Code as administered by the Bankruptcy Court. The BCSD will continue to receive funds collected by the Louisville Water Company (the "LWC") for BU under its current rate, possibly subject to an offset. "As receiver, the BCSD currently has the right and authority to control and manage the cash and the operations of [BU] pursuant to the Receiver Order, until such time as the Franklin Circuit Court orders otherwise." Bankruptcy Case, Order, September 26, 2016, p. 2, ¶4 (part of **Exhibit F** to BU's Surcharge Application). The Trustee waives no right to seek an accounting or turnover of BU's assets from the BCSD, but the Trustee has no current plans to change the status quo.

**VI. BU IS OBLIGATED TO PROVIDE SERVICE TO ITS CUSTOMERS.**

BU's service obligation to its customers is being met by the BCSD both as the Receiver and under the contracts between BU and the BCSD. The service being provided to BU's customers by the BCSD is the reason the Trustee has not sought the turnover of BU's assets, including monthly revenues collected for BU by the LWC, which are deposited in an account controlled by the BCSD.

**CONCLUSION**

The MSD case, PSC Staff Opinion 2015-011, the Commission's Informal Conference Memo in BU's previous Surcharge Case, the Commission's Orders in the Cedar Hills and Friendly Park Development Abandonment Cases and the BK Court Orders all support the Trustee's right to file this Surcharge Application for BU.

Respectfully submitted,

*/s/ Holland N. McTyeire V*

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**CERTIFICATE OF SERVICE**

I certify that on January 13, 2016 an electronic version of the Response Of BU To The Legal Issues Identified In The Commission's December 29, 2016 Order was uploaded to the Commission's E-Filing System. A copy of the Electronic Filing Center Notification is included with the filing of this Response with the Commission. The electronic version of the paper filing is a true and accurate copy of each paper filed in paper medium. No party has been excused from the Commission's electronic filing procedures.

*/s/ Holland N. McTyeire V*

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