

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
)

ATTORNEY GENERAL’S RESPONSE TO THE
BRIEF OF BULLITT UTILITIES, INC.

Comes now the intervenor, Attorney General of the Commonwealth of Kentucky (“AG”), by and through his Office of Rate Intervention, and pursuant to the Commission’s December 29, 2016 Order tenders the following response to the brief filed by Robert W. Keats, Chapter 7 Bankruptcy Trustee (“the Trustee”), on behalf of Bullitt Utilities, Inc. (“Bullitt Utilities”).

This case arises out of the Trustee’s application to the Commission requesting a surcharge. In its December 29, 2016 Order, the Commission declined to accept the Trustee’s application for filing and instead ordered the Trustee to file a brief addressing several questions related to Bullitt Utilities’ right to request a surcharge under state law. The Commission also permitted intervenors in the case to file a brief in response. Bullitt Utilities filed its response to the Commission’s Order on January 13, 2017. Although the Trustee maintained his position that Bullitt Utilities has the authority to request a surcharge, he failed to substantially answer several of the Commission’s questions and offered little substantive law to support his conclusions.¹ The Attorney General

¹ Case No. 2016-00401, *Electronic Application of Bullitt Utilities, Inc. for a Surcharge*, Response of BU to the Legal Issues Identified in the Commission’s December 29, 2016 Order (Ky. PSC Jan. 13, 2017).

addresses the Commission's questions below and asserts that the Trustee does not have the authority to request a surcharge on behalf of Bullitt Utilities.

LEGAL ANALYSIS

I. Bullitt Utilities' Status as a Utility is Significantly Altered by Abandonment

The Commission first requested that the Trustee address Bullitt Utilities' status as a "utility" pursuant to KRS 278.010(3)(f), in the context of Bullitt Utilities' ability to file an application for a surcharge claim under state law.² Although the Trustee's Brief attempts to address the status of Bullitt Utilities as a utility subject to Commission jurisdiction, the Brief fails to offer any support for the Trustee's assertion that state law allows Bullitt Utilities to request a surcharge after abandonment has already been granted.

Bullitt Utilities, prior to abandonment, was clearly a utility under Commission jurisdiction.³ As the Trustee acknowledges, the appointment of Bullitt County Sanitation District as receiver did not change this. The fact that Bullitt Utilities continues to be a utility subject to Commission jurisdiction, however, does not fully address Bullitt Utilities' current "status" concerning its ability to request a surcharge from the Commission. The real confusion stems from the effect of Bullitt Utilities' ongoing Bankruptcy case on the abandonment and receivership, which are governed by state law. Contrary to the Trustee's claims, the Bankruptcy Order provides no clarity on this point. The Bankruptcy Court offers no resolution between its ruling that the Trustee controls the chose in action (referred to as the "surcharge claim") and its subsequent holding that the Order is not intended to alter anything regarding the Franklin Circuit Court Order establishing Bullitt County Sanitation District (BCSD) as receiver.⁴ This conflict is particularly

² Case No. 2016-00401, Order (Ky. PSC Dec. 29, 2016) at 22.

³ Case No. 2015-00290, *Bullitt Utilities, Inc.'s Notice of Surrender and Abandonment of Utility Property*, Order (Ky. PSC Aug. 31, 2015) at 1.

⁴ Case No. 2016-00401, Application, Exhibit F, Order (Filed Sept. 26, 2016) at 2.

troubling considering the Franklin Circuit Court's Order must follow KRS 278.021(6), which grants the receiver power to bring or defend any cause of action on behalf of the utility as the court may authorize.

The Trustee relies solely on the language of the Bankruptcy Order and provides no attempt to reconcile this conflict. In effect, the Trustee is trying to benefit from the abandonment by requesting a surcharge for the benefit of Bullitt Utilities' creditors without having to assume responsibility for running a sewer utility. This violates the clear intent of the abandonment statute. The Commission has previously considered a similar line of reasoning in an abandonment case and concluded that allowing a utility to abandon unprofitable facilities while retaining profitable assets "would be contrary to the plain meaning of KRS 278.021 and would not be in the public interest."⁵ In that case, the Commission held that KRS 278.021 requires abandonment of *all* utility property and assets with no "specific allowance for abandonment of only select portions of a utility's assets."⁶ Accordingly, the Commission denied the utility's request to abandon.

In light of the Commission's interpretation of KRS 278.021, the Trustee's claim that Bullitt Utilities' status as a utility under the jurisdiction of the Commission and the Bankruptcy Court allows him to request a surcharge cannot stand. Under the abandonment statute, Bullitt Utilities chose to relinquish all utility property and assets and turned over possession and control to the Court appointed receiver. However, the Trustee's claim to authority rests on the Bankruptcy Court's judgment that the "surcharge claim" is an asset of the Bankruptcy estate, which the Trustee controls.⁷ In holding that the "surcharge claim" is an asset of the Bankruptcy estate, the judge relies

⁵ Case No. 2016-00106, *Ridgelea Investments, Inc. Notice of Surrender and Abandonment of Utility Property Namely Three (3) Franklin County Wastewater Treatment Plants*, Order (Ky. PSC Sept. 19, 2016) at 8.

⁶ *Id.* at 7-8.

⁷ Case No. 2016-00401, BU Response at 3.

on the fact that Bullitt Utilities retained legal title to the property.⁸ As the Commission previously noted, there is no mechanism under state law which allows a utility, or its appointed Bankruptcy Trustee, to abandon the responsibilities of running a utility while retaining control of possible sources of profit.⁹ In fact, the only avenue state law provides is unwinding an abandonment and returning possession and control of assets to a utility.¹⁰ While the Trustee's response repeatedly mentions his power to request turnover of Bullitt Utilities' assets, the Trustee never acknowledges that this would mean resuming the responsibilities of running a sewer utility, which would require the Trustee to demonstrate the requisite knowledge and training to operate a sewer system, regardless of whether the Bankruptcy Code would allow it.¹¹ By failing to address the fundamental ways in which abandonment alters the status of a utility under state law, the Trustee attempts to circumvent the limitations the Commission's finding of abandonment places on Bullitt Utilities and, as its representative, the Trustee. As the representative of an abandoned utility, the Trustee has neither possession nor control of any of the assets in the Bankruptcy estate that are already controlled under the receivership, and therefore has no authority to request a surcharge.

II. Bullitt Utilities Has No Legal Authority to File a Tariff with the Commission

Second, the Commission requested the Trustee address Bullitt Utilities' legal authority to file a tariff with the Commission. The Trustee's response offers no support for the position that Bullitt Utilities has this authority. Instead, the response implies that such authority somehow grows organically out of the Bankruptcy Court's Orders. In doing so, the Trustee ignores clearly

⁸ Case No. 2016-00401, Application, Exhibit F, Order (Filed Sept. 1, 2016) at 7-8.

⁹ See, Case No. 2016-00106, Order (Ky. PSC Sept. 19, 2016).

¹⁰ KRS 278.021(7) states, "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."

¹¹ KRS 278.020(5) (requires anyone proposing to acquire control of a utility to demonstrate the financial, technical, and managerial abilities to provide reasonable service).

contradictory provisions of state law, as well as the actual language of the Bankruptcy Court's Order.

As the Trustee recognizes in his response, state law provides BCSD, as the appointed receiver, with the legal authority to file a tariff on behalf of Bullitt Utilities. Pursuant to KRS 278.021, Franklin Circuit Court appointed BCSD as receiver after the Commission granted Bullitt Utilities' request to abandon its assets and property.¹² In its Order, the Franklin Circuit Court authorized BCSD to "exercise generally the powers conferred by this Court and such other powers as are usual and incidental to the management of a public utility providing sewage collection and treatment service to the public."¹³ Filing a tariff with the Commission is clearly usual and incidental to the management of a public utility, and, in fact, an appointed receiver is required to do so.¹⁴ When "a receiver or trustee assumes *possession and operation* of a utility," the receiver must file a notice of adoption of the existing tariff with the Commission.¹⁵ Under these Orders and regulations, BCSD as receiver clearly has legal authority to file a tariff on behalf of Bullitt Utilities.

However, this authority does not similarly extend to the Trustee, regardless of his unfounded assertions that there is no legal difference between his authority and BCSD as receiver. Bullitt Utilities voluntarily ceded possession and control of its operations by requesting to abandon them. As discussed previously, this relieved Bullitt Utilities of its obligations and rights to manage its operations and transferred those obligations and rights to BCSD when the abandonment became effective on September 23, 2015.¹⁶ Furthermore, as the Trustee and the Commission have acknowledged, the Trustee does not possess any rights greater than those held by Bullitt Utilities

¹² Case No. 2015-00290, Order (Ky. PSC Oct. 16, 2015); *Public Service Commission of Kentucky v. Bullitt Utilities, Inc.; Commonwealth of Kentucky, Acting through and by the Energy and Environment Cabinet; and Bullitt County Sanitation District*, Franklin Circuit Court, Civil Action No. 15-CI-946 (filed Sept. 1, 2015).

¹³ Civil Action No. 15-CI-946, Order (Franklin Cir. Ct. Sept. 23, 2015) at 1.

¹⁴ 807 KAR 5:011, Section 11.

¹⁵ *Id.*, Section 11(1)(d) (emphasis added).

¹⁶ Case No. 2015-00290, Order (Ky. PSC Oct. 16, 2015).

at the time the Bankruptcy proceeding commenced.¹⁷ In effect, the Trustee asserts that Bullitt Utilities' ongoing legal title to its assets allows him to choose the elements of managing a utility in which he wishes to engage without altering the Franklin Circuit Court's Order granting those powers to BCSD as receiver. This circumvents the clear intent of the abandonment statute and undermines the legal and practical authority of the receiver.

Additionally, even if read as broadly as the Trustee urges, the Bankruptcy Court's Orders clearly do not provide any authority to the Trustee to engage in management of Bullitt Utilities' operations. The Bankruptcy Court found that the Trustee holds title to the property of the Bankruptcy estate, but that BCSD as receiver has "the right and authority to control and manage the cash and the operations of [Bullitt Utilities] pursuant to the Receiver Order, until such time as the Franklin Circuit Court orders otherwise."¹⁸ Despite the Trustee's claim, any ruling on the "surcharge claim" does not create legal authority where none exists, especially in light of the Bankruptcy Order's clear words on the subject. Bullitt Utilities has no authority to file a tariff with the Commission. BCSD, as the appointed receiver, has the only authority to file a tariff with the Commission on behalf of Bullitt Utilities. Suggesting that an abandoning utility retains the right to file a tariff as well as the receiver ignores the very purpose of abandonment and receivership.

Without the authority to file a tariff with the Commission, it seems doubtful that the Trustee would have the authority to request an increase in rates on behalf of Bullitt Utilities, especially when that increase has no connection with service currently provided.

III. Bullitt Utilities' Obligations to Render Service to the Customers of Hunters

Hollow Assumed by BCSD as Receiver

¹⁷ Case No. 2014-00255, Response of Chapter 7 Trustee of Bullitt Utilities, Inc. to the Commission's January 21, 2016 Order (Ky. PSC Jan. 29, 2016) at 7; Case No. 2015-00255, Order (Ky. PSC Apr. 14, 2016) at 7-8.

¹⁸ Case No. 2016-00401, Application, Exhibit F, Order (Filed Sept. 26, 2016) at 2.

The Commission also asked the Trustee to explain what obligations Bullitt Utilities has to render service to the customers of the Hunters Hollow collection system. Although the Trustee does not explicitly define Bullitt Utilities' obligations to serve the Hunters Hollow customers, his response contends that Bullitt Utilities continues to have an obligation to serve those customers currently met by the BCSD "both as the Receiver and under the contracts between [Bullitt Utilities] and the BCSD."¹⁹ The Trustee offers no legal support for his assertion that Bullitt Utilities has any continuing service obligations and recklessly misstates the conditions under which BCSD currently operates the Hunters Hollow collection system.

Relieving a utility of its obligation to continue serving its customers is one of the most critical features of legally abandoning a utility under KRS 278.021. In fact, the majority of the statute concerns the continued provision of service after the Commission grants a request to abandon in order to minimize the effects felt by customers. A receiver appointed by Franklin Circuit Court becomes obligated under the statute to "restore or maintain a reasonable level of service, and to serve the best interests of its customers."²⁰ To prevent a lapse in service, one of the Commission's chief concerns when dealing with wastewater utilities, the Commission has generally imposed on abandoning utilities the duty to continue providing service until Franklin Circuit Court attaches utility assets and appoints a receiver.²¹

The Commission's Order granting Bullitt Utilities' request for abandonment illustrates this principle. On August 31, 2015, the Commission granted Bullitt Utilities' request and made a finding of abandonment.²² Despite its finding, the Commission went on to state:

¹⁹ Case No. 2016-00401, Response of BU, at 5.

²⁰ KRS 278.021(5).

²¹ See, e.g., Case No. 2015-00100, *An Investigation of Cedar Hills Disposal Sanitation Corporation's Notice of Intent to Abandon Service*, Order (Ky. PSC, filed Apr. 11, 2016); Case No. 2015-00101, *An Investigation of Friendly Park Development, Inc.'s Notice of Intent to Abandon Service*, Order (Ky. PSC Apr. 11, 2016).

²² Case No. 2015-00290, Order (Ky. PSC Aug. 31, 2015) at 5.

However, the Commission must also be guided by the clear directives of the Kentucky General Assembly through their enactment of KRS 278.030(2), which requires every utility to "'furnish adequate, efficient and reasonable service," and KRS 278.020(5), which prohibits the abandonment of a utility "without prior approval by the commission." Bullitt Utilities is currently providing wastewater service and any interruption of that service would likely result in a directive from the Bullitt County Health Department that the residences being served are uninhabitable and that they remain so until such time as wastewater service is resumed. Thus, to ensure the continuity of wastewater service and avoid a potential evacuation of 689 residences, the Commission finds that Bullitt Utilities is obligated to continue operating the Hunters Hollow collection system and related facilities for 30 days or until the Franklin Circuit Court enters an Order attaching Bullitt Utilities' assets and placing them under the sole control and responsibility of a receiver, whichever occurs earlier.²³

After Franklin Circuit Court appointed BCSD as receiver of Bullitt Utilities on September 23, 2015, the Commission issued a second Order declaring the abandonment effective as of that date and relieving Bullitt Utilities of any obligation to continue providing service.²⁴ The only duty the Commission imposed on Bullitt Utilities at that time was to safeguard all books, records, and other documents until delivered to BCSD as receiver or as otherwise instructed by Franklin Circuit Court.²⁵ Given that the abandonment proceeding clearly transferred the legal obligation to provide service to and collect rates from the Hunters Hollow customers to BCSD as receiver, Bullitt Utilities has no continuing duty to provide service.

Finally, the Trustee's assertion that BCSD continues to serve Hunters Hollow customers out of a contractual obligation to Bullitt Utilities is misleading at best. Evidenced by BCSD's recent resolution, the contract the Trustee references between Bullitt Utilities and BCSD for the acceptance and treatment of wastewater is not only expired, but also allegedly breached by Bullitt

²³ *Id.* at 5-6 (emphasis added).

²⁴ Case No. 2015-00290, Order (Ky. PSC Oct. 16, 2015).

²⁵ *Id.*

Utilities.²⁶ BCSD continues to fulfill its duty as receiver to serve the best interests customers of the Hunters Hollow System by accepting and treating the wastewater generated by the system.²⁷ According to its resolution, the leadership of BCSD remains committed to carrying out its duties as receiver until directed otherwise by a court of competent jurisdiction.²⁸ Unless the Trustee is prepared to resume providing service to these customers in addition to pursuing compensation of Bullitt Utilities' creditors, Bullitt Utilities has no interest in the service provided to Hunters Hollow customers or the rates collected for that service.²⁹

IV. Bullitt Utilities' Interest in the Rates Collected from Hunters Hollow Customers

Finally, the Commission requested the Trustee demonstrate Bullitt Utilities' interest in the rates collected from the customers of the Hunters Hollow collection system. The Trustee's response points only to the Bankruptcy Court's opinion that the Trustee has title to the assets of the debtor's estate and therefore the "right" to assert control over the chose in action.³⁰ Simultaneously, however, the Trustee acknowledges the BCSD's right and authority to control and manage the cash and operations of Bullitt Utilities pursuant to the Franklin Circuit Court Order establishing the receivership.³¹ Again, the Trustee provides no legal argument to reconcile this contradiction under state law.

In fact, Bullitt Utilities' interest in the rates collected from the Hunters Hollow customers seems clear under state law. Pursuant to KRS 278.021(7), "The [appointed] receiver shall control

²⁶ Case No. 2016-00401, AG Response, Exhibit A (attached).

²⁷ *Id.*

²⁸ *Id.*

²⁹ In its Application, Bullitt Utilities asserts that the requested surcharge is intended only to repay the specific creditors listed in the Application. (Application at 2). However, the Trustee offers no priority schedule as proof that any surcharge granted would not be used to pay other creditors than those listed. Attorney General's **Exhibit B** demonstrates that other creditors have filed proofs of claim in Bullitt Utilities' Bankruptcy case but were not included in Bullitt Utilities' Application to the Commission. Given the uncertainty of the status of creditors in the Bankruptcy case, it is unclear how the Trustee intends to secure the proposed funds for his chosen creditors.

³⁰ Case No. 2016-00401, BU Response at 3.

³¹ *Id.* at 4.

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.”³² As long as the receivership continues, BCSD as receiver is tasked with collecting all receivables and profits and depositing all such funds in a separate bank account with an accurate accounting of all profits collected and expenses incurred.³³ Under this framework, an abandoning utility retains the right to return to Franklin Circuit Court and request that the receivership be dissolved and its assets returned. The statute envisions no other method by which an abandoning owner may regain control of utility assets, although he may still have legal title to them.³⁴ Unless and until Franklin Circuit Court orders BCSD to return control of the assets to Bullitt Utilities, the Trustee has only an amorphous potential interest in those assets. As a result, the Trustee has even less of an interest in the rates charged to the customers served by the Hunters Hollow collection system. Since Bullitt Utilities has no obligation to provide service to Hunters Hollow customers, Bullitt Utilities has no interest in the rates collected in order to fund that service. BCSD, as the receiver charged with serving the best interests of the customers, remains responsible for providing service and collecting jurisdictional rates as set by the Commission.³⁵

CONCLUSION

WHEREFORE, based on the legal analysis and reasons set forth above, the Attorney General asserts the Trustee has failed to prove any authority under state law to request a surcharge. Bullitt Utilities’ status as a utility under state law has been fundamentally altered by the

³² KRS 278.021(7).

³³ Civil Action No. 15-CI-946, Order (Franklin Cir. Ct. Sept. 23, 2015) at 2.

³⁴ Staff Opinion No. 2015-011, *Bullitt County Sanitation District request for Advisory Opinion regarding receivership for abandoned utility* (Ky. PSC Aug. 21, 2015); see, *Louisville & Jefferson County Metropolitan Sewer District v. Douglass Hills Sanitation Facility*, 592 S.W.2d 142, 149-50 (Ky. 1979) (stating that bare legal title to a collection system, of itself, has “very little practical significance.”).

³⁵ Civil Action No. 15-CI-946, Order (Franklin Cir. Ct. Sept. 23, 2015) at 2.

Commission's grant of abandonment and Franklin Circuit Court's appointment of a receiver. As a result, Bullitt Utilities, and the Trustee on its behalf, has no authority to file a tariff with the Commission, has no obligation to provide service to the customers of the Hunters Hollow collection system, and therefore has no interest in the rates collected from those customers. Accordingly, Bullitt Utilities, through the Trustee, cannot request a surcharge in order to pay Bullitt Utilities' creditors.

Respectfully submitted,

ANDY BESHEAR
ATTORNEY GENERAL



KENT A. CHANDLER
S. MORGAN FAULKNER
REBECCA W. GOODMAN
ASSISTANT ATTORNEYS GENERAL
700 CAPITAL AVE, SUITE 20
FRANKFORT KY 40601-8204
PHONE: (502) 696-5453
FAX: (502) 573-1005
Kent.Chandler@ky.gov
Samantha.Faulkner@ky.gov
Rebecca.Goodman@ky.gov