

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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In the Matter of:

APPLICATION OF SOUTHERN WATER AND)
SEWER DISTRICT FOR AN ADJUSTMENT IN) Case No. 2012-00309
RATES PURSUANT TO THE ALTERNATIVE RATE)
FILING PROCEDURE FOR SMALL UTILITIES)

ATTORNEY GENERAL'S
WRITTEN COMMENTS
FOR ORDER OF 1 MARCH 2013

The Attorney General submits his Written Comments in response to the issues set forth in the Commission's Order of 1 March 2013. The Attorney General notes his 15 November 2012 filing of Written Comments on the Report of Commission Staff, and he asks that the Commission consider those comments in tandem with this response. The Attorney General does not request an oral argument.

1. Does Southern Water and Sewer District ("Southern District") have any legal obligation to assist Floyd County Fiscal Court in making the 2005 Lease Agreement payments in the absence of a written agreement between Southern District and Floyd County Fiscal Court requiring such assistance?

Response:

It is not clear how a court would rule upon the issue if either Southern Water and Sewer District (Southern) or Floyd County Fiscal Court (or, alternatively, a third-party) brought an action for a declaration of rights under KRS 418.045 (or other request for

relief from Southern through a judicial proceeding). In the absence of pleadings by the parties (which would include claims and defenses) as well as discovery, the Attorney General limits his response to the evidence in this administrative record and also excludes consideration of KRS 371.010 (Statute of frauds – contracts to be written) and the doctrine of equitable estoppel.

The record does not include any written agreement between Southern and Floyd County.¹ The record does not demonstrate an actual, sufficiently specific meeting of the minds between Southern and Floyd County; rather, there was an “agreement to agree” or a general unspoken understanding without specific terms.² From the Staff Report: “Staff found no corroborating evidence establishing the terms of the [verbal] agreement.”³ Upon this record (and without reference to the Statute of Frauds), there is no legal obligation.⁴

2. If Southern District has no legal obligation to assist Floyd County Fiscal Court in meeting its obligations under the 2005 Lease Agreement, are Southern District’s voluntary payments to assist Floyd County Fiscal Court in meeting its obligations under the 2005 Lease Agreement lawful?

Response:

¹ Staff Report (15 February 2013), page 13.

² Staff Report, pages 9, 11, and 13 (Halpert thought that a written agreement was executed at approximately the same time as Floyd County Fiscal Court’s initial request for payments, but there is no evidence of the execution and existence of such a document); also pages 11 and 12 (Floyd County Attorney with “very limited knowledge in the underlying waterworks project and related financing” and “minimal knowledge” indicates a “gentleman’s agreement” that Southern would make partial payments.)

³ Staff Report, page 13.

⁴ Whether Floyd County or a third-party could obtain a judicial declaration that Southern has a legal obligation is not clear. The Attorney General expressly limits this response to this proceeding and record.

It is not clear how a court would rule upon the issue in a judicial proceeding. In the absence of pleadings by the parties (which would include claims and defenses) as well as discovery, the Attorney General limits his response to the evidence in this administrative record and also excludes consideration of KRS 371.010 (Statute of frauds – contracts to be written) and the doctrine of equitable estoppel.

Southern Water and Sewer District is a water district created under KRS Chapter 74 and has such powers as provided by statute and defined by case law. As a utility that is subject to the regulation of the Kentucky Public Service Commission, Southern must obtain Commission authorization to issue any securities or evidence of indebtedness.⁵ There are instances in which Commission authorization is not necessary.⁶ However, the claim of obligation under the 2005 Lease Agreement does not fall within any of these exceptions. With regard to KRS Chapter 278, the payments consequent to an indebtedness that is not authorized by or exempted from Commission Order are unlawful with regard to KRS Chapter 278.

3. If Southern District has no legal obligation to assist Floyd County Fiscal Court to meet its obligations under the 2005 Lease Agreement, may Southern District's voluntary payments to assist Floyd County Fiscal Court in meeting its obligations under the 2005 Lease Agreement be recovered through rates for water service?

⁵ KRS 278.300.

⁶ KRS 278.300 (8), (10), and (11); also KRS 278.023.

Response:

Upon the existing record and Commission Orders to date: The answer is no.⁷ To permit Southern to make voluntary payments in the absence of an appropriate Commission Order authorizing the indebtedness permits Southern to bypass, without authorization or demonstration of exemption, an express statutory requirement. There are no findings or determinations that the arrangement is “for some lawful object within the corporate purposes of the utility, is necessary or appropriate for or consistent with the proper performance by the utility of its service to the public and will not impair its ability to perform that service, and is reasonably necessary and appropriate for such purpose.”⁸

4. Under what circumstances, if any, may Southern District recovery through its rates for water service its present payments to assist Floyd County Fiscal Court in meeting its obligations under the 2005 Lease Agreement?

Response:

The Commission has yet to determine issues relating to Southern’s compliance (or, alternatively, lack of compliance) with KRS 278.300. Still, without representing that the following scenarios are the only instances, there are two scenarios that could support rate recovery. First, if Southern were adjudged or determined liable consequent to a judicial proceeding, then, arguably – depending upon the facts of the

⁷ There is the possibility that a court could determine that Southern must pay an obligation or otherwise award a judgment against Southern. In such an instance, then the payments may well be recoverable through rates; however, consideration of this scenario requires a great deal of speculation.

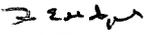
⁸ KRS 278.300 (3).

judicial proceeding⁹ and the language of the judgment, then rate recovery for payments relating to the 2005 Lease Agreement might be appropriate (if not mandated). Second, if as part of a refinancing or other debt agreement or debt restructuring agreement the 2005 Lease Agreement is included in the package, it is possible that the transaction could result in an obligation that warrants recovery through rates.

WHEREFORE, the Attorney General submits his Written Comments.

Respectfully submitted,

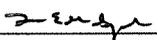
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⁹ A judicial proceeding could also result in a settlement or agreed order of dismissal. As with a determination on the merits, the language of a settlement would have to be examined.

Notice Regarding Filing and Certificate of Service

Counsel certifies that an original and ten copies of these Written Comments were served and filed by hand-delivery to Jeff Derouen, Executive Director, Public Service Commission, 211 Sower Boulevard, Frankfort, Kentucky 40601. A copy was served on the Applicant by United States Mail, first-class, postage-prepaid, to Hubert Halbert, Chairman, Southern Water & Sewer District, P.O. Box 610, McDowell, Kentucky 41647. The filing and service took place on 19th day of March 2013.



Assistant Attorney General