

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF)
SOUTHERN WATER AND SEWER)
DISTRICT FOR AN ALTERNATIVE) CASE NO. 2018-00230
RATE ADJUSTMENT)

**SOUTHERN WATER AND SEWER DISTRICT’S RESPONSE TO THE ATTORNEY GENERAL’S
MOTION TO SUPPLEMENT AND MOTION TO STRIKE**

Comes the Southern Water and Sewer District (“Southern”), by and through counsel, and for its Response to the Attorney General’s Motion to Supplement and Southern’s Motion to Strike the David Layne Letter and attached documents filed on January 21, 2019, submits as follows.

On January 28, 2019, it appears Commission staff posted to the electronic case file of this rate case a set of documents, including a cover letter, sent to the Commission from Mr. David Layne, the Treasurer for the Floyd County Fiscal Court. *See Exhibit 1*; January 21, 2019, Layne Letter and Documents (“Layne Letter”). That cover letter and supporting documentation are littered with inaccurate, false, unverified and un-authenticated statements.

Southern filed its application for a rate adjustment in July of 2018. It is now January 29, 2019. The Attorney General had over seven months to investigate these issues in this case, and had the opportunity to do the same in the asset transfer case in 2017. In fact, the Attorney General and the PSC did investigate many of these same issues thoroughly in Southern’s 2012 rate case, Case No. 2012-00309. As indicated by the July 12, 2013 Order of the Commission in Case No. 2012-00309 (“2013 Order”) [*Exhibit 2*], and the Attorney General’s Comments filed on March 19, 2013 (“2013 AG Comments”) [*Exhibit 3*], the legal obligation of Southern to pay

certain debt obligations of the Fiscal Court – the same issues addressed in the Layne Letter – have been long settled by the PSC and the Attorney General. Southern is under no legal obligation to pay the Floyd County Fiscal Court for the infrastructure in question. This is another brazen attempt by the Floyd County Fiscal Court to unlawfully and inappropriately assert influence on Southern and its customers.

Southern is entitled to a decision on its rate adjustment application without further delay. The Attorney General’s Motion to Supplement his Post-Hearing Response Brief and request for further investigation within this rate case should be DENIED. In addition, because the Layne Letter and supporting documents contain defamatory, false, un-authenticated, redundant, and irrelevant statements, Southern’s Motion to Strike said letter and documents should be GRANTED.

ARGUMENT

I. THE ATTORNEY GENERAL’S MOTION TO SUPPLEMENT SHOULD BE DENIED.

The Attorney General has moved the Commission to supplement his Post-Hearing Brief Response and to immediately initiate an investigation in the management and the operation of the District including but not limited to the Asset Purchase Agreement previously approved in Case No. 2017-00044, based on the letter and documents allegedly submitted by Mr. Layne. Attorney General Motion to Supplement (“AG Motion”) at 1. This motion should be denied. This rate case has been pending since July 12, 2018, has already been delayed by over a month, the Attorney General failed to intervene in the asset transfer case, and both the Attorney General and the Commission have already thoroughly considered the alleged issues brought forward by the Layne Letter. Again, this is another brazen attempt by the Floyd County Fiscal Court to unlawfully and inappropriately assert influence on Southern and its customers, and the Commission should not allow such undue influence to continue.

a. THE LAYNE LETTER AND SUPPORTING DOCUMENTS CONTAIN EGREGIOUSLY DEFAMATORY, FALSE, INACCURATE, UNVERIFIED AND UN-AUTHENTICATED STATEMENTS.

Although Mr. Layne filed this letter with the Commission on January 21, 2019, there is no indication he had any authority to do so. Mr. Layne states, “FCFC and Citizens of Floyd County are requesting that the rate increase SW has requested be granted and that the reimbursement which, the SW board voted on and agreed to reimburse \$100,000.00 annually regarding the bond, that the FCFC issued be accounted for as an expenditure of Southern Water, until the bond is paid off.” **Exhibit 1**; Layne Letter at 1. The \$100,000 payment has been addressed previously in this case, and in Case No. 2012-00309, and Southern will do so again below. Still, Mr. Layne does not represent the Floyd County Fiscal Court or the citizens of Floyd County, he is only the Treasurer.

Mr. Layne first states, “I agree Southern Water District is a mess.” *Id.* Mr. Layne gives no indication with whom he agrees, nor does he support his opinion that Southern is a “mess.”

Yet, perhaps the most egregious and defamatory statement is where Mr. Layne states, “We also paid Dean Hall \$26,000 a year with benefits to be a go between, SW and the FCFC. So the current superintendent knows all about the payments SW should be reimbursing the FCFC.” *Id.* Mr. Hall was never paid \$26,000 a year with benefits to be a go between Southern and Floyd County Fiscal Court -- this was another individual named Dean -- Dean Hamilton. To suggest that Mr. Hall, the current General Manager of Southern, was being paid extra funds as a “go between,” is part of the type of intimidation scheme the Floyd County Fiscal Court has utilized to attempt to influence Southern throughout the years. This publicly made statement amounts to defamation, where Mr. Layne has published language about Southern and Mr. Hall that will bring Southern and Mr. Hall into public hatred, contempt or ridicule; cause Southern and Mr. Hall to be shunned; and will injure Southern and Mr. Hall. *McCall v. Courier-Journal and*

Louisville Times Co., 623 S.W.2d 882, 884 (Ky. 1981). Such a statement is not only defamatory, it is absurd.¹

In addition, it is unclear who Mr. Layne is referring to when using the title “Superintendent,” nor does he specifically cite to any documents throughout the letter. There are hand written notes throughout the letter and the enclosed documents, presumably by Mr. Layne, but those hand written notes are not authenticated in any way. The enclosed documents also contain handwritten notes throughout and conclusory statements with no basis or foundation. More importantly, this entire issue was previously adjudicated by the Commission in 2012. The Commission held that there was no legal obligation for Southern or anyone else to pay this alleged debt to the Floyd County Fiscal Court. The Layne Letter and supporting documents are irrelevant to this current rate case.

b. DESPITE MR. LAYNE’S UNAUTHORIZED, ONE-SIDED STATEMENTS, THE COMMISSION HAS PREVIOUSLY RULED THAT SOUTHERN HAD NO OBLIGATION TO PAY THIS DEBT. THE ATTORNEY GENERAL AGREED.

In the 2012 rate case, *In the Matter of: Application of Southern Water and Sewer District for an Adjustment in Rates Pursuant to the Alternative Rate Filing Procedure for Small Utilities*, Case No. 2012-00309, the Commission entered an Order denying Southern the ability to recover through rates funding for a requested annual payment of \$100,000 to Floyd County Fiscal Court to assist Floyd County in servicing certain long-term debt. See **Exhibit 2**; 2013 Order at 10.

After reviewing Southern’s application, “[Commission Staff] recommended approval of Southern District's proposed rates for sewer service. Unable to reach a conclusion regarding the reasonableness and lawfulness of the water district's annual payment of \$100,000 to Floyd

¹ Southern has since come into the possession of a follow up letter from Mr. Layne dated January 28, 2019. In that letter, Mr. Layne admits that “the employee who was hired by the FCFC was Dean Hamilton for \$26,000, not Dean Hall.” See **Exhibit 4**; January 28, 2019 Letter from Mr. Layne. That letter appears to not currently be filed with the Commission.

County Fiscal Court to assist Floyd County in servicing certain long-term debt, Commission Staff provided alternative recommendations regarding rates for Southern District's water service.” *Id.* at 2. In his Comments to the Staff report, the Attorney General also “questioned the lawfulness and reasonableness of Southern District's payments to Floyd County Fiscal Court.” *Id.* Subsequently, the Commission “expressly excluded recovery of Southern District's annual \$100,000 payment to Floyd County Fiscal Court and directed Commission Staff to prepare and file a detailed report on the payment and to include in such report all documents and other evidence that was gathered regarding such payments.” *Id.* at 3.

Later, the Commission Staff filed a report on Southern’s payments to Floyd County Fiscal Court, including all documents and other evidence gathered during the course of the review. *Id.* The Attorney General filed comments on March 19, 2013, in which he maintained that “Southern District had no legal obligation to make annual payments to Floyd County Fiscal Court, and that absent Commission authorization of any agreement between Southern District and Floyd County Fiscal Court, no recovery of the annual payment through rates should be permitted.” *Id.* at 4. Southern District filed no response or objections to the report's findings nor made any request for a hearing. *Id.*

In its Order, the Commission provided a detailed analysis of the annual payments of \$100,000 to Floyd County Fiscal Court to assist Floyd County in meeting its annual lease payments on a general obligation lease agreement that Floyd County Fiscal Court entered with the Kentucky Area Development District’s Financing Trust in May 2005. *Id.* The Commission found that the Floyd County Fiscal Court was contributing, not lending the approximately \$2,474,000 towards the cost of an infrastructure project consisting of approximately 27 miles of water distribution main, six new water storage tanks, six pumping stations and a telemetry

system. *Id.* and fn. 9. Rural Development loans also “reflected that Floyd County Fiscal Court’s funds were a contribution.” *Id.*

In 2004, Floyd County officials approached Southern and suggested that Southern bear a portion of the debt-service payments associated with the contribution. *Id.* at 5. On August 23, 2004 the Southern Board voted to make annual payments of \$100,000 to defer a portion of the debt-service payments. *Id.* “Subsequently an official of the firm managing Southern District’s operations [Veolia Water] wrote in December 2004 to the Floyd County Judge/Executive to advise that ‘[a]t your request, the District recently agreed to assist the Floyd County Fiscal Court in repaying the debt on the bond issue, in the amount of \$100,000.00 per year.’” *Id.* Former and current Floyd Court officials disputed the existence of any written agreement regarding the payments, and instead stated “that the parties had a general expectation or ‘gentlemen’s agreement’ that Southern District would bear a portion of the debt-service payments.” *Id.* at 5-6.

Southern did not make any payments to Floyd County until 2010, when it made a partial payment. *Id.* at 6. Southern then paid varying amounts every year for total of \$250,415.02. *Id.* Southern began making payments only after the publication of numerous negative newspaper articles regarding the water district’s failure to pay its alleged debt. *Id.*

The Commission found “no credible evidence in the record of any legal obligation on [Southern’s] part to make payments to Floyd County Fiscal Court.” *Id.* There was no documentary evidence submitted by the Floyd County Fiscal Court or Southern that Southern and Floyd County Fiscal Court “prepared or executed a written agreement or debt instrument obligating Southern District to make annual payments.” *Id.*

In addition, “None of the legal documents surrounding any of the transactions refer to an agreement between Southern District and Floyd County Fiscal Court.” *Id.* Specifically, the Commission found:

- (1) Southern's application to the Commission for a Certificate of Public Convenience and Necessity for the waterworks improvement projects and for approval of the financing plan do not mention an agreement [*id.*];
- (2) Rural Development's letter of conditions for the grant and loan to Southern for the water improvements project expressly labels the Floyd County funds as a contribution [*id.* at 6];
- (3) No reference was made to repayment when, in 2002, Floyd County Judge/Executive at the time, Paul Thompson, informed Rural Development that the funds were available for dispersal [*id.*];
- (4) The Floyd County Fiscal Court resolutions related to the two issuances of bond anticipation notes and to the 2005 Lease Agreement are silent on the existence of any agreement with Southern [*id.*];
- (5) The Floyd County Fiscal Court minutes addressing the approval of these debt instruments fail to reference any agreement. *Id.*

The Commission also states "the case against the existence of any agreement is further strengthened by the absence of any application by Southern District for required regulatory approval for such an obligation." *Id.* Despite Southern having sought Commission approval of the issuance of evidences of indebtedness on several occasions, "it made no application for approval of the alleged agreement." *Id.* There is also no evidence in the record that Southern provided notification "of any long-term debt obligation entered into prior to July 15, 2008 to the State Local Debt Officer." *Id.* at 7-8.

"The existence of a 'gentlemen's agreement' between the two governmental entities, moreover, is so removed from sound government and business practices to strain credulity." *Id.* at 8. "Assuming for purposes of argument that Southern District and Floyd County Fiscal Court entered an oral agreement or understanding in which Southern District

agreed to assume a portion of Floyd County Fiscal Court's debt-service obligation, such agreement or understanding would be legally unenforceable. The lack of any written document would be contrary to the Statute of Frauds' prohibition on oral contracts that cannot be performed within one year." *Id.* "Such an agreement also lacks any consideration and, therefore, cannot constitute a valid and enforceable contract." *Id.* In the absence of any legal obligation to pay a portion of Floyd County Fiscal Court's debt-service obligations, Southern District's payments are tantamount to a donation or contribution to Floyd County Fiscal Court." *Id.* at 9. The Commission then cautioned the Southern Board, stating, "KRS Chapter 74 does not authorize a water district to make fund transfers to a local government entity for the sole purpose of providing financial assistance," and "The Commission cautions the members of Southern District's Board of Commissioners that any payment of water district funds to any local government entity for the sole purpose of providing financial assistance may be considered as malfeasance and constitute grounds for removal from office. *See* KRS 74.455(1)." *Id.* There is no obligation by Southern to pay the Floyd County Fiscal Court anything related to the bond issue of 2002.²

The Commission ultimately found that Southern "has failed to demonstrate that the annual payment of \$100,000 to Floyd County Fiscal Court is reasonable or lawful. We further

² "For a contract to exist the following elements must be present: there must be an offer and acceptance, full and complete terms outlining the basis of the contract, and consideration. *Cantrell*, at 384 (Ky. App 2002)...For a contract to be valid, it must set forth the promises of performance to be rendered by each party, and the terms of the contract must be sufficiently complete and definite to enable a court to determine the measure of damages in the event of breach. *Kovacs v. Freeman*, 957 S.W.2d 251, 254 (Ky. 1997)." *Lamb v. Light Heart, Inc.*, 2018 WL 2070834, at *2 (Ky. Ct. App. May 4, 2018). None of the elements of a contract exist to substantiate Mr. Layne's claims. Mr. Layne's letter(s) appear to simply be a vindictive attempt to derail Southern's rate request at the last minute.

find that recovery of the payment through Southern District's rates for water service is not appropriate and that Southern District's proposal for such recovery should be denied.” *Id.* at 10.

Based on the above, these issues have been fully investigated, vetted, and analyzed by the Commission and the Attorney General. The Layne Letter and supporting documentation contribute nothing to this. Nowhere in the Layne documents is there a signed agreement between Southern and the Floyd County Fiscal Court obligating Southern to pay a portion of the Floyd County Fiscal Court’s debt-service obligations. The filing of the Layne Letter was nothing more than an attempt by an employee of the Floyd County Fiscal Court to collaterally attack and sabotage Southern’s current rate application. The Commission and the Attorney General have already determined that Southern had no legal obligation to pay a portion of Floyd County Fiscal Court's debt-service obligations in the 2012 case, the same debt in question in Mr. Layne’s letter.

Having already thoroughly investigated and adjudicated Southern’s obligation to pay a portion of Floyd County Fiscal Court's debt-service, the Attorney General’s Motion to Supplement should be DENIED. Southern is entitled to a decision on its rate adjustment application without further delay.

II. THE LAYNE LETTER AND SUPPORTING DOCUMENTS SHOULD BE ORDERED TO BE STRICKEN FROM THE RECORD OF THIS CASE.

The Layne Letter and supporting documents contain egregiously defamatory, false, inaccurate, unverified, and un-authenticated statements. These documents are also redundant and irrelevant, as these matters were fully investigated and adjudicated by the Commission in 2012, and the information contained in the letter and supporting documentation is not pertinent to Southern’s current application for a rate adjustment. Therefore, Southern respectfully moves this Commission to order the Layne Letter and supporting documentation stricken from the record in this case.

CONCLUSION

Southern's legal obligation to pay a portion of Floyd County Fiscal Court's debt-service obligations has been laid to rest. Both the Commission and the Attorney General determined Southern has no legal obligation to these debt-service obligations. This is another attempt by the Floyd County Fiscal Court to exert undue influence over Southern, its customers, and this rate adjustment process. The Attorney General had its chance to fully investigate and comment on these debt service obligations in the 2012 case, which it did. The Attorney General had another chance to intervene in the 2017 asset transfer case – it failed to do so. The Attorney General should not be allowed to delay this rate case any further to again investigate these same issues. Southern is entitled to a decision on its rate adjustment application without further delay. The Attorney General's Motion should be DENIED.

Southern's motion requesting the Commission to order the Layne Letter and supporting documentation stricken from the record in this case should be GRANTED. The statements contained in the letter are defamatory and false, and the information contained therein is redundant and irrelevant.

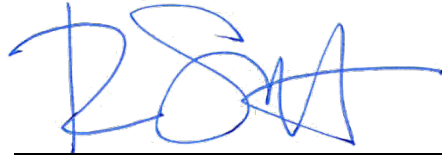
Respectfully submitted,



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CERTIFICATE OF SERVICE

In accordance with 807 KAR 5:001, Section 8, I certify that the Applicant's electronic filing of this Reply is a true and accurate copy of the same document being filed in paper medium; that the electronic filing was transmitted to the Public Service Commission on January 29, 2019; that there are currently no parties that the Public Service Commission has excused from participation by electronic means in this proceeding; and that an original paper medium will be delivered to the Public Service Commission on or before January 29, 2019.



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