

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

**In the Matter of:**

<b>ELECTRONIC APPLICATION OF</b>	)	
<b>NORTHERN KENTUCKY WATER DISTRICT</b>	)	
<b>AND STOLL KEENON OGDEN PLLC FOR</b>	)	<b>CASE NO. 2019-00081</b>
<b>ACCREDITATION AND APPROVAL OF A</b>	)	
<b>PROPOSED WATER DISTRICT</b>	)	
<b>MANAGEMENT TRAINING PROGRAM</b>	)	

**APPLICATION**

Northern Kentucky Water District (“NKWD”) and Stoll Keenon Ogden PLLC (collectively “Joint Applicants”) jointly apply for an Order from the Public Service Commission accrediting and approving a proposed water district management training program pursuant to KRS 74.020 and 807 KAR 5:070.

In support of their application, the Joint Applicants state:

1. NKWD is a water district organized pursuant to KRS Chapter 74.
2. NKWD’s mailing address is: 2835 Crescent Springs Road, Erlanger, Kentucky 41018-0640. Its email address is: lrechtin@nkywater.org.
3. NKWD provides retail water service to all or portions of Boone, Campbell, and Kenton Counties, Kentucky and provides wholesale water service to non-affiliated water distribution systems in Boone, Campbell, Kenton and Pendleton Counties, Kentucky.
4. NKWD is not a corporation, limited liability company or partnership. It has no articles of incorporation or partnership agreements.
5. Stoll Keenon Ogden PLLC is a Kentucky Limited Liability Company that was organized under the laws of the Commonwealth of Kentucky on December 28, 2005 and is currently in good standing. It provides legal services to local, regional, national and international clients.

6. Stoll Keenon Ogden PLLC's mailing address is: 300 West Vine Street, Suite 2100, Lexington, Kentucky 40507-1801. Its email address for purposes of this Application is: gerald.wuetcher@skofirm.com.

7. The Joint Applicants propose to sponsor and conduct a water management training program on April 24, 2019 at NKWD's offices in Erlanger, Kentucky. The program is entitled "Northern Kentucky Water Training 2019." A copy of the proposed agenda is attached to this Application as **Exhibit 1**.

8. As reflected in Exhibit 1, the proposed training program will include presentations on recent developments in utility regulatory law, including a general overview of recent Kentucky court and Public Service Commission decisions; the statutory and regulatory requirements of the Public Service Commission related to the construction and financing of water and wastewater utility improvement projects; general employment law principles and recent developments in federal and state employment law and how these developments will affect water and wastewater utilities; appropriate water and wastewater utility actions to manage and replace aging water and wastewater infrastructure; Public Service Commission show cause proceedings; and a panel discussion on recurring legal issues present in the operation and management of water and wastewater systems. These presentations will enhance the attendees' understanding of relevant legal issues involved in the management, operation, and maintenance of water and wastewater systems and are calculated to enhance and improve the quality of the management, operation and maintenance of the attendees' water and wastewater systems.

9. The proposed training program consists of six hours of instruction and should be accredited and approved as water management training satisfying the requirements set forth in KRS 74.020(7) to establish a water district commissioner's eligibility for a maximum annual

salary of \$6,000. **Joint Applicants are not requesting that the proposed training program be accredited as a program of instruction for newly appointed commissioners.**

10. A biographical statement containing the name and relevant qualifications and credentials for each presenter is attached at **Exhibit 2** of this application.

11. The written materials to be provided to each attendee are attached at **Exhibit 3**. These materials are of the same type and nature as those provided at the accredited training program conducted at NKWD's offices for the past four years.<sup>1</sup> In addition to a copy of each speaker's presentation, the Joint Applicants will provide each attendee with a flash drive containing an electronic copy of applicable laws, regulations, Kentucky court decisions, and Public Service Commission orders, as well as several reference publications. Should any presenter revise or amend his or her presentation prior to the presentation or provide additional written materials to the attendees, the Joint Applicants will include a copy of the revised presentation with their sworn statement and report regarding the instruction.

12. The Joint Applicants have applied or will shortly apply to the Kentucky Bar Association, the Division of Compliance Assistance, and the Department of Local Government for accreditation of the proposed training program for six hours of continuing education credit.

13. The Joint Applicants have sent notice of the proposed training program by electronic mail to the water districts and water associations that are under Public Service Commission jurisdiction as well as representatives of investor-owned and municipal utilities,

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<sup>1</sup> See *Application of Northern Kentucky Water District For Accreditation and Approval of A Proposed Water District Management Training Program*, Case No. 2018-00091 (Ky. PSC May 9, 2018); *Application of Northern Kentucky Water District For Accreditation and Approval of A Proposed Water District Management Training Program*, Case No. 2017-00144 (Ky. PSC March 23, 2017); *Application of Northern Kentucky Water District and Stoll Keenon Ogden PLLC For Accreditation and Approval of A Proposed Water District Management Training Program*, Case No. 2016-00146 (Ky. PSC May 5, 2016); *Application of Northern Kentucky Water District and Stoll Keenon Ogden PLLC For Accreditation and Approval of A Proposed Water District Management Training Program*, Case No. 2015-00147 (Ky. PSC May 18, 2015).

county judge/executives, county attorneys, and members of the Kentucky Bar Association who are believed to have an interest in the proposed program's subject matter.

14. The Joint Applicants will retain a record of all water district commissioners attending the proposed training program.

15. No later than May 31, 2019, the Joint Applicants will file with the Public Service Commission a sworn statement:

- a. Attesting that the accredited instruction was performed;
- b. Describing any changes in the presenters or the proposed program curriculum that occurred after certification; and,
- c. Containing the name of each attending water district commissioner, his or her water district, and the number of hours that he or she attended.

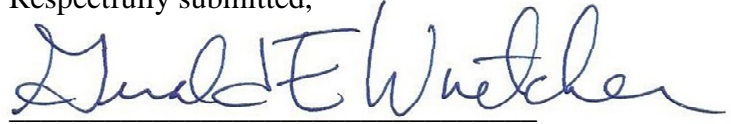
16. The Joint Applicants will include with the sworn statement documentary evidence of the program's certification for continuing education credit by certifying authorities and a copy of any written material provided to the attendees that is not included in this Application.

17. Joint Applicants will admit representatives of the Public Service Commission to the proposed training program at no charge to permit such representatives to assess the quality of the program's instruction, monitor the program's compliance with the Public Service Commission directives, regulations or other requirements, or perform any other supervisory functions that the Public Service Commission deems necessary.

WHEREFORE, the Joint Applicants request that the Public Service Commission approve and accredit the proposed training program entitled "Northern Kentucky Water Training 2019" for six hours of water district management training.

Dated: March 11, 2019

Respectfully submitted,

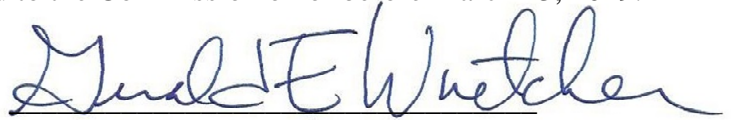


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Lexington, Kentucky 40507-1801  
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Telephone: (859) 231-3017  
Fax: (859) 259-3517

*Counsel for Northern Kentucky Water District and  
Stoll Keenon Ogden PLLC*

CERTIFICATE OF SERVICE

In accordance with 807 KAR 5:001, Section 8, I certify that the Joint Applicants' March 11, 2019 electronic filing of this Application is a true and accurate copy of the same document being filed in paper medium; that the electronic filing has been transmitted to the Commission on March 11, 2019; that there are currently no parties that the Commission has excused from participation by electronic means in this proceeding; and that an original paper medium of this Application will be delivered to the Commission on or before March 13, 2019.



Gerald E. Wuetcher

# **EXHIBIT 1**

**Northern Kentucky Water Training**  
**Presented by**  
**Northern Kentucky Water District & Stoll Keenon Ogden PLLC**  
**April 24, 2019**  
**2835 Crescent Springs Road**  
**Erlanger, Kentucky**

## Morning Agenda

- 7:45 - 8:30    **Registration and Refreshments**
- 8:30 – 8:35    **Program Overview and Welcome**
- 8:35 - 9:35    **Recent Developments in Utility Regulation – Damon Talley**  
This presentation reviews recent developments in public utility law and regulation. Topics include unaccounted water loss, revisions to the Open Meetings Act, sovereign immunity, wholesale water purchase agreements, franchises, laws enacted by the 2018 and 2019 General Assembly, and their effect on water utility operations. The presenter will also examine recent court and Commission decisions and possible trends represented by these decisions.
- 9:45 - 10:45    **Hot Topics in Employment Law: 2019 Update – Amy Miles**  
This presentation reviews general employment law principles and addresses recent developments in federal, state, and local employment laws. The presenter will also discuss a water commissioner’s role in providing a hostile free work environment in the “Me Too” era.
- 10:55 – 11:55    ***Special Session I* – PSC Consumer Services, One-on-One Discussion – Rosemary Tutt**  
This is a question and answer session for utility customer representatives with the Manager of the Commission’s Consumer Services Branch. The requirements of the Commission’s regulation on customer relations will be examined in detail. Seating is limited.
- 10:55 – 11:55    **Aging Infrastructure – Your Role in Solving This Problem – Greg Heitzman**  
This presentation stresses the need for water utilities to develop a comprehensive Asset Management Program in light of Kentucky’s Aging Water Infrastructure. Kentucky’s Infrastructure Report Card will also be discussed. Other topics include Best Practices, Capital Planning, Managerial and Technical Challenges in the Water Industry, Water Loss, and Water Rates.
- 11:55 – 12:30    **Lunch (Provided on site)**

## Afternoon Agenda

- 12:30 – 1:30 ***Special Session II*** – PSC Consumer Services, One-on-One Discussion – Rosemary Tutt  
Second session.
- 12:30 – 1:30 **Regulatory Issues in the Construction and Financing of Water and Wastewater Facilities – Gerald Wuetcher**  
This presentation reviews the requirements that water and wastewater utilities must meet when constructing new facilities and issuing the debt necessary to finance such construction. The presenter examines the method of analysis that the PSC has historically used to determine whether a proposed project requires a certificate of public convenience and necessity and the recent revisions to KRS 278.020 that create exceptions for water districts and water associations. The forms of project financing that require PSC approval will also be reviewed. The presenter will then discuss preparing an application for a certificate of public convenience and necessity and for authorization to issue evidences of indebtedness and strategies for successfully obtaining faster Commission review and approval of those applications.
- 1:40 - 2:40 **So You Got Caught? Show Cause Enforcement Proceedings at the Public Service Commission – Gerald Wuetcher and Damon Talley**  
You and your utility are ordered to appear before the PSC for alleged regulatory violations and to explain why you should not be assessed a large penalty. How should you respond? This presentation examines the methods the PSC uses to enforce KRS Chapter 278 and PSC regulations. The presenters will review the procedures used at PSC enforcement hearings and the sanctions that the PSC can impose for violations. They will discuss various approaches to responding to PSC enforcement actions, including strategies to mitigate the severity of possible sanctions, and actions that utilities and their officers can take to prevent common statutory and regulatory violations. They will also discuss the potential liabilities that utility officers, including commissioners and directors, face and strategies to reduce those officers' exposure.
- 2:45 – 3:45 **Legal Issues in the Operation & Management of Water Systems – Panel Discussion**  
**Panelists: Damon Talley, Gerald Wuetcher, John N. Hughes, David Koenig, and Alex Mattingly**  
A panel of attorneys will entertain audience questions regarding frequently recurring legal issues faced by water utilities. Discussion is expected to address KRS Chapter 74 and its effects on the management and operation of water districts, as well as other highly relevant statutory provisions, such as the Claims against Local Government Act, Bidding Requirements provision of KRS Chapter 424, Eminent Domain, Local Model Procurement Law, Whistle Blowers Act, and general laws related to special districts. Kentucky Public Service Commission regulatory requirements will also be discussed.
- 3:45 **Closing Remarks/Administrative Announcements**



# **EXHIBIT 2**



## **Biography**

**Greg C. Heitzman, PE, MBA**  
**President**  
**BlueWater Kentucky**  
**Louisville, KY**

**2016**

Greg Heitzman is President of BlueWater Kentucky, a management consulting firm serving the water and wastewater industry. From 2011 to 2015, he served as Executive Director/CEO of the Louisville Metropolitan Sewer District (MSD). Prior to MSD, he worked 31 years with the Louisville Water Company serving as Chief Engineer from 1991 to 2007 and President/CEO from 2007 to 2013.

In his executive roles for Louisville MSD and Louisville Water, Greg provided leadership for Mayor Fischer's One Water Partnership to consolidate water services and administrative functions of Louisville MSD and Louisville Water. Greg also led strategic initiatives to expand water and wastewater services in the region, develop high performance teams, establish model programs for corporate controls (policy, procedures and work instructions), and develop new lines of business and technology to enhance revenue and reduce costs.

Greg obtained his Bachelor and Master's degrees in Civil Engineering from the University of Kentucky and an MBA from the University of Louisville. He is a licensed Professional Engineer in Kentucky and recipient of AWWA George Warren Fuller Award. He is an active member in both AWWA and the Water Environment Federation/Association. He currently serves on the following industry and community boards: Water Research Foundation; Water Information Sharing and Analysis Center (Water ISAC); Louisville Water Foundation; Better Business Bureau; and Tree Louisville Commission.

He and his wife, Linda, reside in Louisville. Their daughter, Claire, is married and teaches high school in Lexington, KY.



**625 Myrtle Street**  
**Louisville, Kentucky**  
**502-533-5073**

**John N. Hughes (Jack)  
124 W. Todd St.  
Frankfort, KY 40601  
502 227 7270**

**Admitted to Practice: Kentucky Supreme Court: 1976**

**Member Kentucky Bar Association**

**U.S. District Court for the Eastern and  
Districts of KY 1977**

**U.S. Sixth Circuit Court of Appeals**

**Education: Centre College, Danville Ky.  
B.A. Government, Economics, 1971**

**University of Louisville Law School,  
J.D., 1976**

**Since 1989 I have been in the private practice of law limited to representation of telecommunications, natural gas, electric, private, public and municipal water and wastewater utilities in regulatory and related matters before the Kentucky Public Service Commission, state circuit and appellate courts, federal district courts and the Sixth Circuit Court of Appeals .**

# BIOGRAPHICAL INFORMATION

**DAVID A. KOENIG**  
**Attorney at Law**  
**223 Main Street**  
**P.O. Box 6205**  
**Florence, KY 41022-6205**  
**(859) 525-6161**

## **EDUCATION:**

College:	College of William & Mary 1968-1970
	University of Kentucky B.A., 1972
	University of Kentucky College of Law J.D., 1975

## **LEGAL EXPERIENCE:**

1975 - Present	Attorney engaged in private practice.
1984 - 1986	Public Defender Boone District & Circuit Courts
1986 - 1988	Traffic Alcohol Prosecutor Boone County Attorney's Office
1990 - 1996	Domestic Relations Commissioner Boone Circuit Court
1992	Assistant Legal Counsel Northern Kentucky University
1997- 2007	Child Support Attorney Boone County Child Support Office

1997 - 1998                      Assistant Commonwealth Attorney  
Boone-Gallatin Commonwealth Attorney's Office

2007 - Present                    Assistant County Attorney  
Boone County Attorney's Office

and

Director,  
Boone County Child Support Office

**RELEVANT LEGAL EXPERIENCE:**

1992 – Present                    Counsel,  
Boone County Water District

1998 – Present                    Co-Counsel,  
Boone-Florence Water Commission

**MISCELLANEOUS:**

- Past President, Boone County Bar Association;
- Past Director, Northern Kentucky Bar Association;
- Past Board Member:
  - Family Service of Greater Cincinnati;
  - Tri-City YMCA;

## **Alex Mattingly**

Alex Mattingly currently serves as the Manager of Legal, Compliance, and Regulatory Affairs for the Northern Kentucky Water District. At NKWD, he serves in a dual management and in-house counsel role that includes responsibilities for compliance with applicable Kentucky statutes and administrative regulations, management of claims and litigation, and as a policy advisor for the District management team. Prior to joining the Water District, Alex served as an attorney for the Kentucky Justice and Public Safety Cabinet and as the City Administrator of the cities of Elsmere and Florence. Alex got his start in public service as the Assistant City Solicitor (Assistant City Attorney) and Alcoholic Beverage Control Administrator for the City of Covington.

Mattingly is a 2002 graduate of Brescia University in Owensboro, and received a law degree (juris doctor) in 2007 from Northern Kentucky University's Salmon P. Chase College of Law. He is admitted in the Commonwealth of Kentucky, the United States District Court for the Eastern District of Kentucky, and the United States Court of Appeals for the Sixth Circuit.



### Amy L. Miles

Direct Phone: 502.568.5751

amy.miles@skofirm.com

### BAR & COURT ADMISSIONS

Kentucky

U.S. Court Of Appeals, Seventh Circuit

U.S. Court Of Appeals, Sixth Circuit

U.S. District Court, Eastern District Of  
Kentucky

U.S. District Court, Northern District Of  
Indiana

U.S. District Court, Southern District Of  
Indiana

U.S. District Court, Western District Of  
Kentucky

### EDUCATION

University of Louisville Brandeis School of  
Law

2014, J.D., magna cum laude

Centre College

B.A., cum laude

### RECOGNITION

ABA-BNA Award for Excellence in Labor  
and Employment Law, 2014

University of Louisville Brandeis School of  
Law Carl A. Warns, Jr. Award, 2014

University of Louisville Brandeis School of  
Law ALI CLE Scholarship and Leadership  
Award, 2014.

*University of Louisville Law Review*  
Managing Editor, Volume 52

Phi Kappa Phi

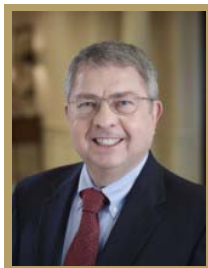
Brandeis Honor Society

## Amy L. Miles

Amy joined Stoll Keenon Ogden in 2015 as an Associate in the Labor, Employment & Employee Benefits practice. She brings a unique perspective to the firm from her previous experience as a clerk for the honorable Candace J. Smith, U.S. Magistrate Judge in the Eastern District of Kentucky.

As employment laws continually change, Amy counsels businesses and organizations on how to navigate complex statutes and regulations, which can create confusion around an employer's legal obligation to their employees. She provides practical, business-tailored advice that helps employers bridge the understanding gap in their organizations and avoid costly challenges in the courtroom.

**Labor, Employment & Employee Benefits:** Amy represents a variety of national, regional, and local employers in all areas of employment law, including pre-litigation investigations, litigation, and appeals. She also handles agency investigations, including proceedings before the Equal Employment Opportunity Commission, the Department of Labor, and the Kentucky Commission on Human Rights. She routinely advises employers on strategies to resolve workplace issues and prevent litigation by offering recommendations on day-to-day operational practices and broader employee-related policies. She has also conducted training for her clients relating to a variety of issues, including the Americans with Disabilities Act, the Family and Medical Leave Act, and Title VII of the Civil Rights Act. In cases of litigation, she represents employers responding to claims of discrimination, retaliation and wrongful termination, employment breach of contract, and wage and hour disputes, among other concerns.



## Damon R. Talley

Of Counsel

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Direct Fax: 270.358.9560

damon.talley@skofirm.com

### Hodgenville

112 North Lincoln Blvd.

Hodgenville KY, 42748-1512

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### Lexington

300 West Vine Street

Suite 2100

Lexington KY, 40507-1801

T: 859.231.3000

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### Louisville

500 West Jefferson Street

2000 PNC Plaza

Louisville KY, 40202-2828

T: 502.333.6000

F: 502.333.6099

## PRACTICES

Utility & Energy

## INDUSTRIES

Public Utility

## BAR & COURT ADMISSIONS

Kentucky

Kentucky Supreme Court

U.S. District Court, Eastern District Of Kentucky

U.S. District Court, Western District Of Kentucky

United States Supreme Court

## EDUCATION

University of Kentucky College of Law

1975, J.D.

University of Kentucky College of Engineering

1972, B.S.M.E.

## Damon R. Talley

Damon serves as Of Counsel and is a member of the Utility & Energy practice. He practices out of the Louisville, Lexington and Hodgenville, Kentucky offices. Damon brings to SKO more than 35 years of experience working in private practice focusing on public utility work. He serves as General Counsel of the Kentucky Rural Water Association and has served in this capacity since 1979.

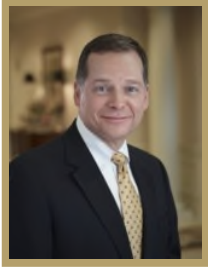
He is a frequent speaker at training sessions sponsored by the Kentucky Rural Water Association, Public Service Commission, Division of Water, Utility Management Institute, and other Utility Industry Groups.

Damon received his J.D. from the University of Kentucky College of Law in 1975, and earned his B.S.M.E. in 1972 from the University of Kentucky College of Engineering. He served as a board member of the Kentucky Infrastructure Authority for 15 years (2000-2015), and was a charter member, a long-time board member and Board Chairman for two terms of the KY FFA Foundation, Inc. He also serves as a board member for a variety of other non-profit organizations.



**ROSEMARY TUTT**

Ms. Tutt is the manager of the Kentucky Public Service Commission's Consumer Services Branch. This branch is responsible for investigating consumer complaints against the 1,500 utilities the Commission regulates, as well as handling the public's inquiries regarding those utilities rates, rules and services. She oversees a staff of two utility investigators. Ms. Tutt began her employment with the Commission in 2009. She was selected as Manager of the Consumer Services Branch in 2017.



### Gerald E. Wuetcher

Counsel to the Firm

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### PRACTICES

Utility & Energy

### BAR & COURT ADMISSIONS

Kentucky

Kentucky Supreme Court

U.S. Court Of Appeals For The Armed Forces

U.S. District Court, Eastern District Of  
Kentucky

U.S. District Court, Western District Of  
Kentucky

### EDUCATION

Emory University

1984, J.D.

Johns Hopkins University

1981, B.A.

## Gerald E. Wuetcher

Jerry is Counsel to the Firm and a member of the Utility & Energy practice. He brings to Stoll Keenon Ogden more than 25 years of experience working at the Kentucky Public Service Commission, where he served as a staff attorney, deputy general counsel and executive advisor. He frequently appeared before the Commission in administrative proceedings involving electric, natural gas, water and sewer utility issues and represented the Commission in state and federal courts. Jerry also served as the Commission's representative in a number of interagency groups addressing water and wastewater issues. Between 2009 and 2013, he was the Commission's representative on the Board of the Kentucky Infrastructure Authority. Jerry developed and implemented the Commission's training program for water utility officials and served as an instructor for that program. He is frequent speaker on utility and local government issues before such organizations as the Kentucky Rural Water Association, Kentucky League of Cities, the Kentucky Association of Counties, and the Utility Management Institute.

Jerry served for 27 years in the United States Army as a judge advocate before retiring at the rank of Colonel in 2011. His service encompassed numerous roles on active duty and in a reserve status.

Jerry received his J.D. from Emory University in 1984, and earned his B.A. in History with Honors in 1981 from Johns Hopkins University. Jerry also serves as a member of Board of Trustees of the Woodford County Library and has previously served as an adjunct professor at the University of Louisville Brandeis School of Law.

# **EXHIBIT 3**

**RECENT DEVELOPMENTS IN UTILITY  
REGULATION**

Damon Talley  
Stoll Keenon Ogden PLLC  
damon.talley@skofirm.com  
(270) 358-3187



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**DISCUSSION TOPICS**

1. Notice to PSC
2. Franchises & Contracts
3. Borrowing Money
4. 911 Litigation Update

Continued . . .



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**DISCUSSION TOPICS**

5. Call Before You Dig
6. 2018 General Assembly
7. Recent PSC Orders
8. Excessive Water Loss



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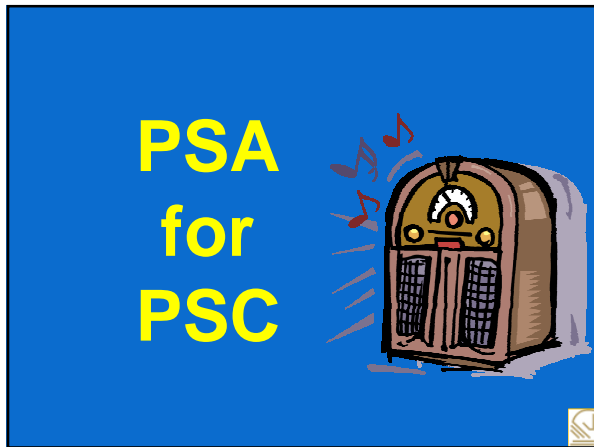
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## Reporting Requirements

- Must Notify PSC if . . .
  - Vacancy Exists
  - Appointment Made
- When?      Within 30 Days

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## Vacancy

- Inform CJE 60 Days Before Term Ends (KRS 65.008)
- CJE / Fiscal Court – 90 Days
- Then, PSC Takes Over
  - CJE Loses Right To Appoint



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## E-Mail Address Regs.

- All PSC Orders Served by E-mail
- Duty to Keep Correct E-mail Address on file with PSC
  - Default Regulatory E-mail Address
- Duty to List E-mail Address in Application & All Other Papers
  - Utility Official
  - Its Attorney



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## E-Mail Address

- Who is Covered?
  - Water Districts
  - Water Associations
  - Investor Owned Utilities
  - **Municipal Utilities**



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## Why Municipals?

- Contract Filing
- Tariff Change (Wholesale Rate)
- Protest Supplier's Rate Increase
- Acquiring Assets of Another Utility
- Avoid Delays



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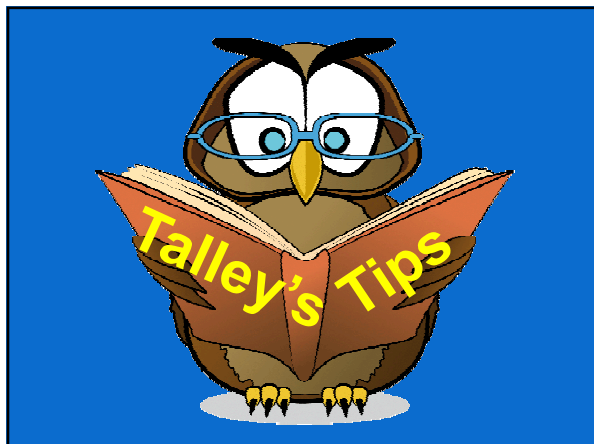
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## Default Regulatory E-mail Address

- Send E-mail to PSC
  - psc.reports@ky.gov
- Send Letter to PSC
  - Gwen R. Pinson,  
Executive Director

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## Franchises and Contracts

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### Franchise

- Definition
  - Private
    - Rights granted by company to individual or business to sell a product
    - Examples

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**Franchise**

- Definition
  - Government
    - Privilege granted by government to utility to provide specific utility service
    - Permission to erect facilities over & under streets, alleys, & sidewalks
    - Fee: 3%
    - Examples

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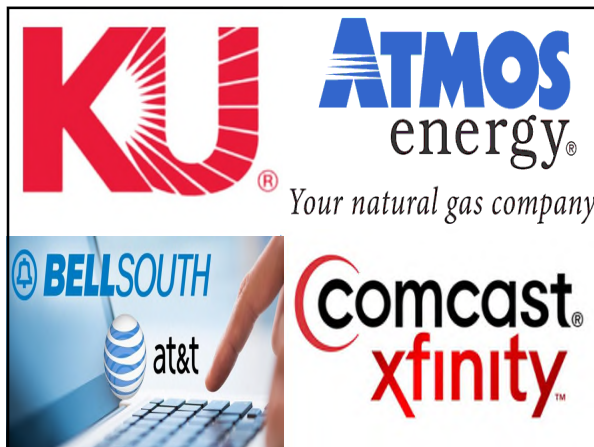
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## Livingston County Case

Ledbetter WD

vs.

Crittenden-Livingston WD

Circuit Court

Case No. 2015-CI-00079

Opinion Rendered: 1-25-17

Status: **REVERSED**



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## Court of Appeals

Crittenden-Livingston WD

vs.

Ledbetter WD

Case No. 2017-CA-000578

Oral Argument: 4-24-18

Decided: 8-17-18

Holding: No Franchise



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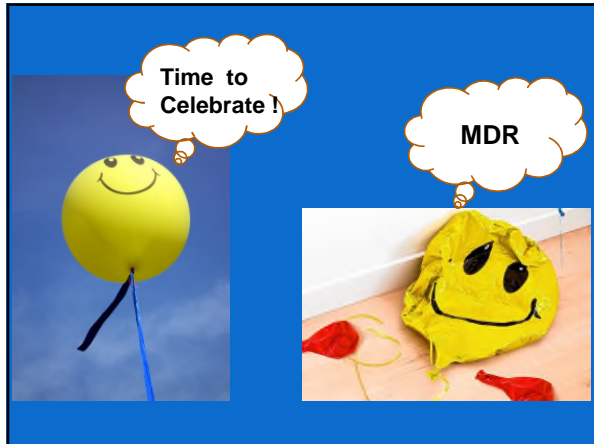
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**Ky. Supreme Court**

Ledbetter W.D.  
vs.  
Crittenden-Livingston WD

Case No. 2018-SC-000494-D  
Motion DR: 09-12-18  
Response: 10-12-18  
Action on Motion: ? ? ? ?

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Franchise Case - Holding  
**40-year**  
Water Supply Contract  
Between 2 Water Districts  
**Valid or Invalid**

- Why? Contract = Franchise
- Over 20 Years
- Basis: Kentucky Constitution Section 164

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**Ky. Constitution Section 164**  
No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding **twenty years**. Before granting such franchise or privilege for a term of years, such municipality shall first, after due advertisement, receive bids therefor publicly, and award the same to the highest and best bidder; but it shall have the right to reject any or all bids.

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**Why?**

- 340 Water Utilities
- 169 WTPs
- 50% Buy Water
- Need Water Supply Contract
- Long Term

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## How Long Is Long Term?

- Lender
  - RD: 40 years
  - KIA: 20 or 30 years
  - Bonds: Length of Bonds



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## Significance

- If Franchise . . . 20 Year Limit
  - Can't Borrow \$ from RD
  - Other Sources – Only if < 20 years
    - KIA
    - Bonds
    - KRWFC



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## Court of Appeals @ Page 4

A **franchise** is generally defined as a **right or privilege granted by** a sovereign power, government or a governmental entity **to a party to do some act which such party could not do without a grant from the government.** A franchise is a grant of a right to use public property or at least the property over which the granting authority has control.



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## C/A Rationale

- Distinction:

For - Profit Utility

versus

Non - Profit Utility

- Water District

- Public Entity



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## C/A Legal Analysis

- One Public Entity Acquiring Service From Another Public Entity

- Purchase of Water Service

- Contract Not Franchise



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## C/A Legal Analysis

- Franchise Grants Governmental Rights

- WD Already Has Rights

- Contract Grants

- Service

- Commodity (Water)



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**C/A Legal Analysis**

- Contract – Provided Water
- Contract – Allowed WD to Better Serve Customers



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**C/A Holding**

- Contract Not Franchise
- Section 164 N/A
  - Longer Than 20 Years
  - No Advertising



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**What's Next?**

- Decision Not Final
- Motion for Discretionary Review Filed: 09 -12-18
- Response Filed: 10 -12-18
- Ky. Supreme Court ? ? ?



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## KRWA's Role

- Filed Amicus Brief in C/A
  - "Friend" of Court
- Protect Validity of Contracts
- Protect Ability to Obtain \$



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## Borrowing



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## KRS 278.300(1)

No utility shall issue any securities or evidences of indebtedness . . . until it has been authorized to do so by order of the Commission.



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**Practical Effect**

- Must Obtain PSC Approval Before Incurring Long-term Debt (Over 2 Years)
- Exception:
  - 2 Years or Less
  - Renewals
    - (3 X 2 = 6 Years)
    - (6 X 1 = 6 Years)

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**Violation**

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**Show Cause Cases**

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**Show Cause Case # 3**  
Case No. 2017 - 469  
Opened: 01- 11 - 2018  
Hearing: 02 - 27- 2018  
Issue: KRS 278.300  
Decision: 09 - 17 - 2018

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### Show Cause Case # 1

Case No. 2016 - 338  
Opened: 10 - 11 - 2016  
Closed: 02 - 23 - 2017  
Issue: KRS 278.300  
Hearing: 12 - 13 - 2016



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### Show Cause Case # 1

- Ruling:
  - \$500 Fine (Suspended)
  - Rejected Advice of Counsel Argument
  - Lawyer on Hook



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### Show Cause Case # 1

- Process Is Noteworthy:
  - Begged to Settle
  - PSC Said No
- Formal Hearing



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## Show Cause Case # 2

PSC Case No. 2017-176  
2017-467

Order: 8-18-2017  
Utility: Water District  
Type: ARF Case  
Holding: Hold Hearing  
Why? Violated 278.300



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## Show Cause Case # 2

Staff Report: 8-9-2017  
Recommended: 24%  Rates  
\$360,000 Annual  
\$30,000 per Month  
3 Loans - Local Bank  
Hearing: 11-1-17  
Decision: 12-20-17



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## Hearing on 11-1-17

- Purposes:
  - Line Loss - 33%
  - Violation of 278.300
  - Purpose of Loans
  - Fringe Benefits



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## Hearing on 11-1-17

- Who Must Attend?
  - Each Commissioner
  - Office Manager
  - Distribution System Manager



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## Show Cause Case # 2

Case No. 2017 - 467  
Opened: 01- 11 - 2018  
Hearing: 02 - 27- 2018  
Resigned: 02 - 27- 2018  
Dismissed: 05 - 04- 2018



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## Show Cause Case # 2

- No Fines
- Lost Revenue
  - Over \$60,000
- Commissioners Resigned



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### Show Cause Case # 3

Case No. 2017 - 469

Opened: 01- 11 - 2018

Hearing: 02 - 27- 2018

Issue: KRS 278.300

Decision: 09 - 17 - 2018



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### Timeline

05 - 03- 2016

Obtained Loan

08 - 03 - 2017

ARF Application Filed

11 - 30 - 2017

Staff Report Issued

01 - 11 - 2018

Show Cause Order

02 - 27 - 2018

Formal Hearing

09 - 17 - 2018

Order



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### Show Cause Case # 3

This is the **third** case in the last year and a half involving a show cause order against a water district utility and/or its commissioners for violating KRS 278.300 by obtaining a loan, the term of which is in excess of two years, without prior approval of the Commission. To date the Commission has **assessed, but not sought, to collect** civil penalties against individual water district commissioners for essentially two reasons.

(Continued)

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### Show Cause Case # 3

**First**, the Commission's goal has been to obtain **compliance** with the requirements of the statute and not to exact a penalty and, **second**, the Commission was determined to **send a message** to these utilities and their local commissioners that they were out of compliance and **future violations** could result in **individual penalties** as well as a **separate penalty against the utility**.

(Continued)

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### Show Cause Case # 3

The Commission also intended to place **all other water districts on notice** that obtaining loans in violation of KRS 278.300 could subject both the utility and its commissioners to civil penalties, and **to provide fair notice that strict enforcement could be expected in future cases**.

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### Show Cause Case # 3

Water districts and their commissioners are hereby put on **final notice** that unauthorized debt incurred after the date of this order may well result in **substantial** civil penalties being **assessed and collected against both** in future show cause cases.

Pages 7 and 8 of Order

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### Show Cause Case # 3

- District Fined \$2,500
  - Pay \$500
  - \$2,000 Suspended
  - Good Behavior
  - One Year
- Commissioner Matthews Dissented



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### Show Cause Case # 3

- Commissioners Fined \$2,000
  - Pay Zero
  - Entire \$2,000 Suspended
  - Good Behavior
  - One Year
- 12 Hours Training



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### Show Cause Case # 3

- Develop Written Policy
  - Borrow \$
  - Hire Lawyer
- Adopt Policy
- File Policy with PSC



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**PSC Commissioners:**

- Take Their Jobs Seriously
- Hands On
- Love Hearings
- Promote Transparency
- Oversight Means Oversight

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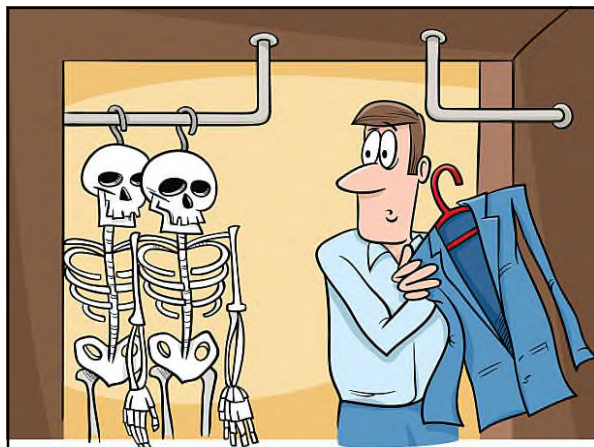
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# 911 Litigation Update

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## Garrard County Case

City of Lancaster, et al  
vs.  
Garrard County, Kentucky

Unpublished  
Opinion

Court of Appeals  
Case No. 2013-CA-000716-MR  
Opinion Rendered: 7-03-14  
Opinion Vacated: 2-18-16  
New Opinion: 8-11-17

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## Campbell County Case

Greater Cincinnati / Northern Ky.  
Apartment Assoc., Inc., et al  
vs.  
Campbell Co. Fiscal Court, et al

Supreme Court of Kentucky  
479 S.W.3d 603 (Ky. 2015)  
Opinion Rendered: 10-29-15  
Became Final: 02-18-16

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## Current Status

- Campbell Co. – Parcel Fee OK
- Fee On Water Service – OK
- Unresolved Legal Issues



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## Unresolved Legal Issues

- Does County Have Legal Authority to:
  - Compel City to Collect Fee?
  - Compel WD to Collect Fee?
  - Compel WA to Collect Fee?
  - Compel IOU to Collect Fee?



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## Recent Developments

- New Ordinances
  - Garrard County
  - Lincoln County
- Fee On Water Service
- Water Utilities to Collect



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## New Garrard County Case

Garrard Co. Water Association  
vs.

Garrard County, Kentucky

Garrard Circuit Court

Case No. 2017 - CI - 00281

Date Filed: 12-11-17

Status: Discovery

Opinion Rendered: ??-??-??



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## Lincoln County Case

City of Stanford, et al  
vs.

Lincoln County, Kentucky

Lincoln Circuit Court

Case No. 2018 - CI - 00062

Date Filed: 03-02-18

Briefs Filed: 10-12-18

Opinion Rendered: ??-??-??



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**If Stuck With A Fee**

- Collection Agreement with County
  - Tax Collector Not Tax Payer
  - Hold Harmless Clause
    - Refunds
    - Legal Fees
- Show As Line Item on Bill  
(If PSC Permits)



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**Changes to Law**  
**KRS 367.4901 to 367.4917**

- Membership Still Voluntary
- Mandatory Fines . . . If Damage
  - Natural Gas Pipeline
  - Hazardous Liquid Pipeline
- PSC Is the **Enforcer**

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## Why Did Law Change?

- Conform with Federal Law
- Too Many Gas Line Accidents
- Effective: 07-14-2018



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## Who Is Affected?

- Excavators
  - All Utilities
  - Contractors
- THIS MEANS YOU!



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## Requirements

- Call 811
- Hand Dig or Use  
“Nonintrusive Means”
- Stop Work If Cause Damage
  - Notify Gas Company
  - Notify PSC



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## What Happens Next?

- Report Due to PSC Within 30 days
- Use Online Report Form
- PSC Staff Investigates
- PSC Demand Letter  
or
- Hearing Before PSC



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## Fines

- Mandatory
  - First Offense: \$1,250
  - Second Offense: \$2,000
  - Third Offense \$4,000
- Exception for Emergency
  - Defined Term: 367.4903(7)



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KENTUCKY PUBLIC  
SERVICE COMMISSION

### Resources:

- PSC website: [psc.ky.gov](http://psc.ky.gov)  
New call-before-you-dig webpage  
launched in June
- Statutes
  - FAQs
  - News releases

Kentucky 811 website: [Kentucky811.org](http://Kentucky811.org)

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For more information:

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Andrew Melnykovich  
Director of Communications  
502-782-2564  
Andrew.Melnykovich@ky.gov

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# 2018 General Assembly



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## Notable Bills

- SB 117 – Ky. 811 - Defeated
- SB 151 – Sewage (Pension)
- HB 513 – Private WWTPs
- HB 362 – Pension Cap
- HB 366 – CPCN Exemption  
KRS 278.020(2)



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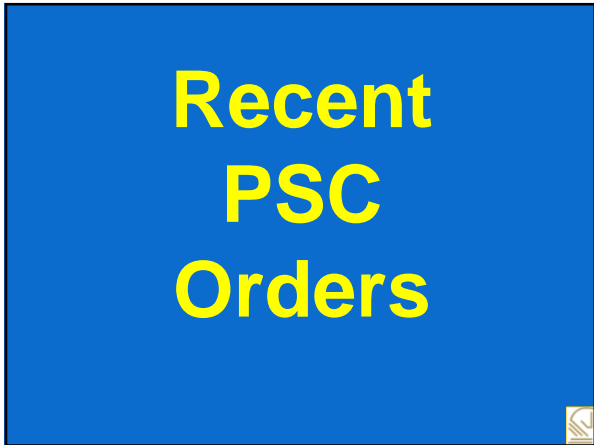
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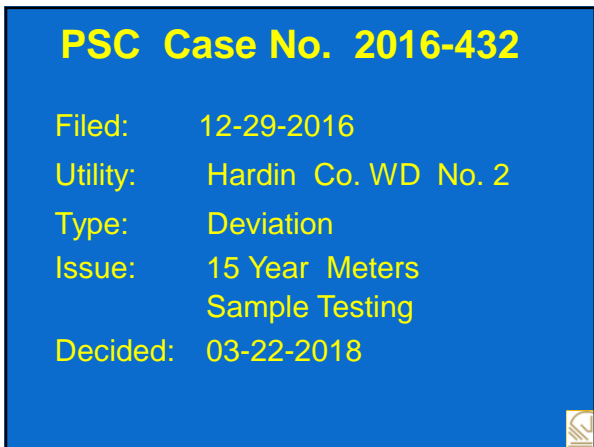
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**PSC Case No. 2017-127**

Filed: 3-10-2017  
Utility: North Mercer WD  
Type: Deviation  
Issue: Office Open  
4 Days a Week  
Decided: 3-16-2018



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**PSC Case No. 2017- 458**

Filed: 12-22-2017  
Utility: Southeast Daviess WD  
Type: CPCN  
Issue: Smart Meters  
Decided: 02-27-2018



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**PSC Case No. 2017- 246**

Filed: 6-30-2017  
Utility: McCreary Co. WD  
Type: Deviation  
Issue: Daily Inspection of  
Grinder Pumps  
Decided: 2-01-2018



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**PSC Case No. 2016 - 394**

Filed: 11-18-2016  
Utility: Ky. American  
Type: Deviation  
Issue: Annual Inspection of  
Meters & Valves  
Decided: 12-12-2017



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**PSC Case No. 2016-427**

Filed: 12-08-2016  
Utility: Northern KY WD  
Type: Deviation  
Issue: Annual Inspection of  
Meters & Valves  
Decided: 02-01-2018



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**Excessive  
Water  
Loss**



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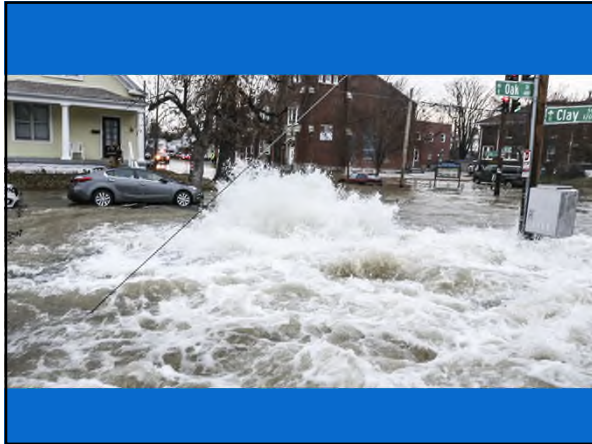
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### Unaccounted-for Water Loss

- 807 KAR 5:066, Section 6(3)

“... for **rate making purposes** a utility’s unaccounted-for water loss shall not exceed fifteen (15) percent of total water produced and purchased, excluding water used by a utility in its own operations.”



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### Terms

- Unaccounted-for Water Loss
  - 15% Maximum
  - Allowance for Flushing, Etc.
- NRW – Non Revenue Water
  - No Allowance for Flushing



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**PSC Case No. 2016 - 068**

Decided: 8-17-16

Utility: Water District

Type: ARF

Issue: Excessive Line Loss



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**PSC Held:**

- Water Loss 39%
  - 15% Maximum Allowed
  - Disallowed 24% Excess
- Disallowed \$135,000 Expenses Excess Water Loss (Cost to Purchase & Pump)



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**PSC Ordered:**

“The Commission is concerned with **excessive water loss** and related costs and directs \_\_\_\_\_ District to **develop and formally adopt a written plan to reduce excessive water loss**. The plan should identify all sources of water loss and each corrective action \_\_\_\_\_ District will take to minimize water loss from each source.”



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# Other Recent Water Loss Cases

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## PSC Case No. 2017 - 064

Decided: 3-09-2017  
Utility: Water District  
Type: CPCN Granted  
Holding: Reprimand & Warning  
Loss = 17%

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## PSC Ordered:

“Failure by \_\_\_\_\_ District to make **significant** progress towards **reducing** unaccounted-for water loss may cause the Commission to pursue **additional action** with the utility.”

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**Actions by PSC**

- Inspection Report
- ARF Case
- CPCN Case
- .023 Case
- PWA Case
- Financing Case
- Deviation Case
- Sewer CPCN Case



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**Actions by PSC**

- Emphasis at Training
- Reduce Rates
- Reprimand & Warning
- PWA Cases
  - Dollars & Cents

Continued . . .



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**Actions by PSC**

- Copy of Inspection Report
  - CJE & Fiscal Court
  - Utility Commissioners
  - Local Newspaper?
- PSC Website?



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**QUESTIONS?**

damon.talley@skofirm.com

270-358-3187

STOLL  
KEENON  
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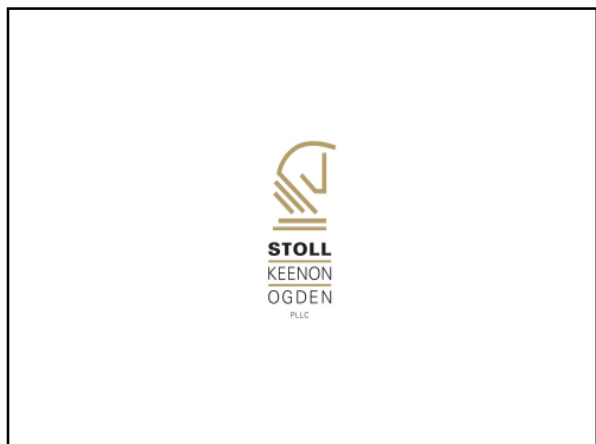
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**Hot Topics in Employment Law:  
2019 Update**

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**Overview**

- General Employment Law Principles
- Avoiding Pitfalls in Pre-Employment
- Drug Testing
- A #MeToo World
- Sexual Orientation: a protected class?
- Employee Leave Proposals
- Legal Developments on the State & Federal Levels

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 **Employment Law Principles**

- General Rule: Employment At-Will
  - Employees without a written employment contract generally can be discharged for good cause, no cause or a cause that some may view as morally indefensible
- Exceptions:
  - Implied Contracts
  - Public Policy
  - Employment protection laws

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 **Federal and State Statutory Protections for Employees**



- Anti-Discrimination Laws
- Wage & Benefit Protections
- Labor-Relations Protections
- State programs (e.g., workers' comp., unemployment benefits)

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 **Harassment**

Harassment can occur on the basis of which protected status?

- Age
- Race
- Religion
- National Origin
- Color
- Disability
- Sex
- Pregnancy
- Military/Veteran
- Sexual Orientation
- Gender Identity
- All of the above




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### Harassment

- ❖ Can occur on the basis of any protected trait
- ❖ Interferes with work
- ❖ Creates an intimidating, hostile or offensive working environment
- ❖ Can be verbal, physical or visual

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### Harassment

- ❖ Isolating, degrading or showing hostility or aversion toward an individual based on that person's protected trait through:
  - Comments, jokes, suggestions, stereotypes
  - Pictures, cards, calendars, toys, emails
  - Unwanted touching
- ❖ Work-related rewards in exchange for sexual favors

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### Kentucky Case

- ❖ **Barber v. United Postal Service, Inc.** (Fayette 2016)
  - Racial harassment claim
  - Effigy of black driver hung by time clock
  - \$5.3 million verdict
  - Motion to overturn verdict denied
    - “The evidence was [the managers] didn’t do anything.”
      - Judge Scorsone
  - Affirmed on appeal (August 2018)

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## Retaliation

- ❖ Taking adverse action against an employee for exercising a protected activity
  - Example: Discharge for reporting harassment or any other violation of the law




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### Which of the following could be retaliation if an employer acts because of the employee's EEO activity?

- A. Reprimand the employee or give a performance evaluation that is lower than it should be
- B. Treat a family member negatively (ex. cancelling a contract with the employee's spouse)
- C. Threaten to make, or actually make reports to authorities (ex. reporting immigration status or contacting the police")
- D. Spread false rumors
- E. All of the above

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## Retaliation: a law unto itself

### Kentucky Case:

- ❖ Meads v. LFUCG (E.D. Ky. 2017)
  - Sanitation worker in Lexington alleged that he was treated differently from younger, white co-workers
  - Complained to Human Resources and Lexington-Fayette Urban County Human Rights Commission
  - Jury finding: No age or race discrimination

**\$200,000 jury verdict for retaliation**

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### The Pre-Employment Stage

- EEOC's Strategic Enforcement Plan: Priority of "eliminating barriers in recruitment and hiring"
  - "Restrictive application processes"
  - "Screening tools with a disparate impact" – e.g., "pre-employment tests; background checks impacting African Americans and Latinos..."
  - "Qualification standards ... that discriminate against individuals with disabilities"




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### Avoiding Pitfalls in Interviews

- Questions should be job- and business- related
- Disability-related questions or medical examinations
  - Pre-offer stage?
    - **None** – even if job-related.
    - But, can ask about ability to perform essential functions
    - Can ask about reasonable accommodations **only if** the applicant has a visible disability or voluntarily discloses




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### Avoiding Pitfalls in Interviews

- Disability-related questions or medical examinations (cont'd)
  - After a conditional offer of employment?
    - Employer can make certain disability-related inquiries or medical examinations – as long as it does so for all employees in the same job category
  - If an applicant tells you his/her disability will not affect job performance, **hiring managers may not pursue the matter.**

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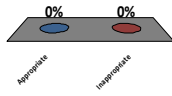
 **STOLL KEENON OGDEN**  
P.L.L.C.

## Avoiding Pitfalls in Interviews

“What impairments do you have?”

- A. Appropriate
- B. Inappropriate

Instead → “This job involves lifting 50 pounds on a regular basis, and standing for long periods. Can you perform these essential functions of this job with or without an accommodation?”



Category	Percentage
Appropriate	0%
Inappropriate	0%

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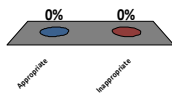
 **STOLL KEENON OGDEN**  
P.L.L.C.

## Avoiding Pitfalls in Interviews

“Please list all arrests and/or criminal convictions.”

- A. Appropriate
- B. Inappropriate

Instead → Limit criminal history inquiries (if any) to convictions that relate to job requirements.



Category	Percentage
Appropriate	0%
Inappropriate	0%

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 **STOLL KEENON OGDEN**  
P.L.L.C.

## Background Checks



I'm sorry, we can't hire you, but your background check was hilarious.

your eCards  
someecards.com

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 **Background Checks**  
**Criminal History Checks**

- EEOC is concerned about discriminatory *impact*
  - i.e., unintentional discrimination
- EEOC Guidance: Federal law permits asking about criminal history, **with limitations:**
  - Narrowly tailored and relevant to the job
  - Conviction vs. arrest

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 **Background Checks**  
**Criminal History Checks**

- Some best practices, per EEOC Guidelines:
  - Eliminate policies that wholly exclude persons from employment based on criminal record
  - Don't ask for arrest-related information



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 **Shifts in Hiring Practices**

- Ban the Box Legislation
  - Primarily impacts government employers
- “Past Salary” question in interviews
  - Perpetuation of gender and racial disparities in compensation

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## Background Checks

### Social Media in the Hiring Process



- **Risk Balancing:**
  - **Benefits:**
    - Screen out bad actors
    - Safeguard your reputation
    - Observe candidates who have a lack of discretion or confidentiality
  - **Drawbacks and Risks:**
    - Can reveal protected statuses
    - Unreliable information?

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## Drug Testing



- **Stages:**
  - Pre-Employment
  - Reasonable suspicion
  - Random
  - Post-Accident
- Uniformly applied
- Consent, Acknowledgment
- Limits on Alcohol Testing

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## Drug Testing

### Post-Accident Testing



- 2016 OSHA regulations prohibit “blanket” post-accident drug testing
- Conduct post-accident drug tests only when:
  - Employee drug use is likely to have contributed to the incident; and
  - A drug test can accurately identify impairment caused by drug use.
- Exception: Federal or state law requires testing

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 **Federal Legislative Developments**

- ◆ Drug Testing and Unemployment Benefits
  - As of March 31, 2017, states are no longer prohibited from drug testing unemployment applicants



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 **#MeToo, More than a Year Later**

- The original #MeToo → 2017 momentum
- Cultural shift, but has legislation followed?

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 In the year and a half following the #MeToo movement, how many pieces of legislation has Congress passed related to sexual harassment in the workplace?

- a. 1
- b. 2
- c. 3
- d. 0



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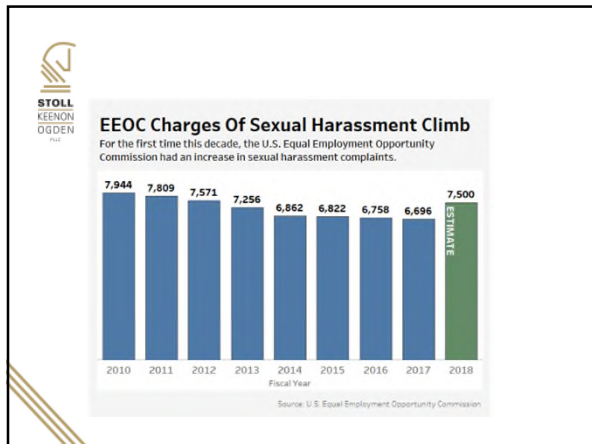
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**#MeToo,  
More than a Year Later**

- What's an Employer to do?
  - "Time Line" for response has shortened
  - Train—early and often!
  - Walk the Walk of an open door policy

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How many states have enacted legislation prohibiting employment discrimination on the basis of sexual orientation and gender identity?

a. 12  
b. 20  
c. 31  
d. 50

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**Sexual Orientation:  
A Protected Class Under Title VII?**

- 2015: EEOC broadens definition of discrimination based on "sex"
- 2017: Seventh Circuit
- 2018: Second Circuit
- Sixth Circuit

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**Employee Leave Proposals**

- National Paid Leave and "Workflex"
- Paid family leave through Social Security

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 **STOLL KEENON OGDEN**  
P.L.L.C.

### Administrative Updates under Trump

- **DOL**
  - Overtime Rules?
- **NLRB**
  - Employee Handbook Policies
- **EEOC**
  - "100% Healed Policies"



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 **STOLL KEENON OGDEN**  
P.L.L.C.

### Kentucky Legal Developments

- Mandatory Arbitration Agreements
- State Wage & Hour Class Actions



Year	FLSA Filings
2011	6,779
2012	7,672
2013	7,882
2014	8,066
2015	8,954
2016	8,308
2017	7,575

FLSA FILINGS IN FEDERAL COURTS

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 **STOLL KEENON OGDEN**  
P.L.L.C.

### Questions? Comments?

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**Report Card on  
Kentucky's Drinking  
Water Infrastructure**

**NORTHERN  
KENTUCKY WATER  
TRAINING**

**ERLANGER, KENTUCKY**

**APRIL 24, 2019  
Presentation by:  
Greg C. Heitzman, PE  
BlueWater Kentucky**




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**2019  
KENTUCKY  
INFRASTRUCTURE  
REPORT CARD**

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**NEW 2017 ASCE GUIDELINES FOR  
GRADING INFRASTRUCTURE**

**A = EXCEPTIONAL: FIT FOR THE FUTURE**  
The infrastructure in the system or network is generally in excellent condition, typically new or recently rehabilitated, and meets capacity needs for the future. A few elements show signs of general deterioration that require attention. Facilities meet modern standards for functionality and resilient to withstand most disasters and severe weather events.

**B = GOOD: ADEQUATE FOR NOW**  
The infrastructure in the system or network is in good to excellent condition; some elements show signs of general deterioration that require attention. A few elements exhibit significant deficiencies. Safe and reliable with minimal capacity issues and minimal risk.

**C = MEDITOCRE: REQUIRES ATTENTION**  
The infrastructure in the system or network is in fair to good condition; it shows general signs of deterioration and requires attention. Some elements exhibit significant deficiencies in conditions and functionality, with increasing vulnerability to risk.

**D = POOR: AT RISK**  
The infrastructure is in poor to fair condition and mostly below standard, with many elements approaching the end of their service life. A large portion of the system exhibits significant deterioration. Condition and capacity are of significant concern with strong risk of failure.

**F = FAILING/CRITICAL: UNFIT FOR PURPOSE**  
The infrastructure in the system is in unacceptable condition with widespread advanced signs of deterioration. Many of the components of the system exhibit signs of imminent failure.

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### **NEW 2017 EVALUATION CRITERIA FOR GRADING INFRASTRUCTURE**

<ol style="list-style-type: none"> <li>1. Capacity</li> <li>2. Condition</li> <li>3. Operations and Maintenance</li> <li>4. Public Safety</li> <li>5. Historical and</li> </ol>	<ol style="list-style-type: none"> <li>6. Future Need</li> <li>7. Resilience</li> <li>8. Innovation/Best Practices</li> </ol>
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### 2017 NATIONAL ASCE REPORT CARD GRADES

2017 Infrastructure Grades	
AVIATION	D
BRIDGES	C+
DAMS	D
DRINKING WATER	D
ENERGY	D+
HAZARDOUS WASTE	D+
INLAND WATERWAYS	D
LEVEES	D
PARKS AND RECREATION	D+
PORTS	C+
RAIL	B
ROADS	D
SCHOOLS	D+
SOLID WASTE	C+
TRANSIT	D-
WASTEWATER	D+



America's Cumulative Infrastructure Grade

A	EXCEPTIONAL
B	GOOD
C	MEDIOCRE
D	POOR
F	FAILING

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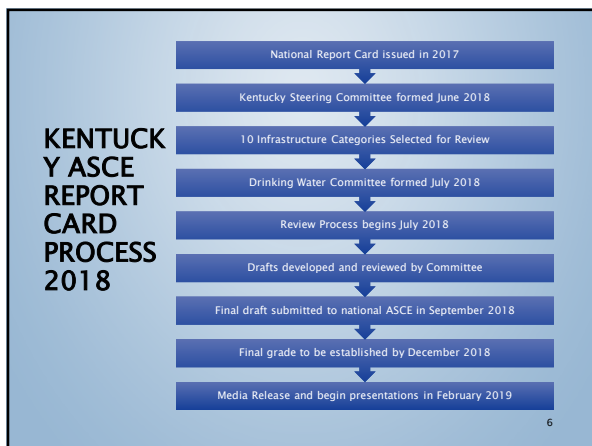
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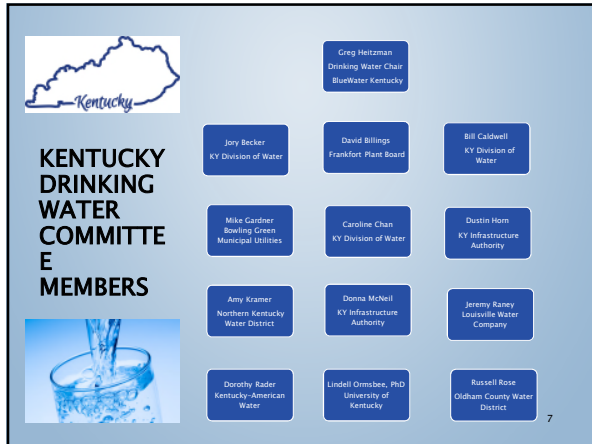
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**KENTUCKY DRINKING WATER COMMITTEE MEMBERS**

- Greg Heitzman, Drinking Water Chair, BlueWater Kentucky
- Jory Becker, KY Division of Water
- David Billings, Frankfort Plant Board
- Bill Caldwell, KY Division of Water
- Mike Gardner, Bowling Green Municipal Utilities
- Caroline Chan, KY Division of Water
- Dustin Horn, KY Infrastructure Authority
- Amy Kriner, Northern Kentucky Water District
- Donna McNeil, KY Infrastructure Authority
- Jeremy Rahey, Louisville Water Company
- Dorothy Rader, Kentucky-American Water
- Lindell Ormsbee, PhD, University of Kentucky
- Russell Rose, Oldham County Water District

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**DRINKING WATER COMMITTEE ACTIVITIES**

- ✓ 13-member committee, representing: small, medium, large water utilities; consultants; regulators; funding agencies; and academia.
- ✓ Met in person and by conference call from July to September 2018
- ✓ 10 draft versions prepared and reviewed by Drinking Water Committee and KY ASCE Steering Committee
- ✓ Reviewed 2010 KY Report Card and 2017 National Report Card
- ✓ Extensive Data provided by KY Division of Water and KY Infrastructure Authority
- ✓ Conducted a weighted evaluation using the national ASCE Criteria

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**KENTUCKY ASSIGNED 2019 DRINKING WATER GRADE OF C+**

- ✓ 2017 National Drinking Water Grade of D
- ✓ Kentucky Drinking Water Grade was a B in 2010 and C in 2017
- ✓ Kentucky has improved in some areas but slipped in other areas
- ✓ New ASCE grading system includes operating, safety and resiliency elements not in prior assessments

KY 2003	US 2009	KY 2010	US 2013	US 2017	KY 2019
C	D-	B	D	D	C+

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### KENTUCKY DRINKING WATER ASSESSMENT

**GREEN - Very Good**  
5 areas

**YELLOW - Average**  
1 area

**RED - Needs Improvement**  
2 areas

Category	Sub-Category	Score	Weight	Weighted Score
20 Capacity	Capacity	4	1	4
	Resiliency	4	1	4
	Performance	4	1	4
21 Condition	Condition	4	1	4
	Resiliency	4	1	4
	Performance	4	1	4
22 Operations & Maintenance	Operations	4	1	4
	Maintenance	4	1	4
	Performance	4	1	4
23 Public Utility Classification with (PUC)	Classification	4	1	4
	Performance	4	1	4
	Weighted Score	4	1	4
24 Historical and Current Funding	Funding	4	1	4
	Performance	4	1	4
	Weighted Score	4	1	4
25 Future Readiness	Readiness	4	1	4
	Performance	4	1	4
	Weighted Score	4	1	4
26 Resilience	Resilience	4	1	4
	Performance	4	1	4
	Weighted Score	4	1	4
27 Innovation and Best Practices	Innovation	4	1	4
	Performance	4	1	4
	Weighted Score	4	1	4
<b>Total Score: 100</b>				

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### KENTUCKY WATER SYSTEMS OVER 95% SERVICE COVERAGE

- ✓ 2000 Governor Paul Patton Senate Bill 409
- ✓ 435 Kentucky Public Water Systems serve 4.3 million people
- ✓ Over 95% of Kentucky served with public water system
- ✓ Recognized nationally for consolidation and regional solutions

Public Drinking Water Coverage for Kentucky

Legend: Population Ranges

- 100,000+
- 50,000 - 100,000
- 10,000 - 50,000
- 1,000 - 10,000
- 0 - 1,000

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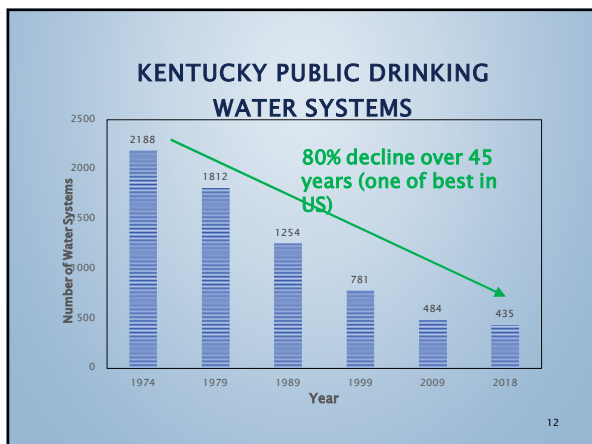
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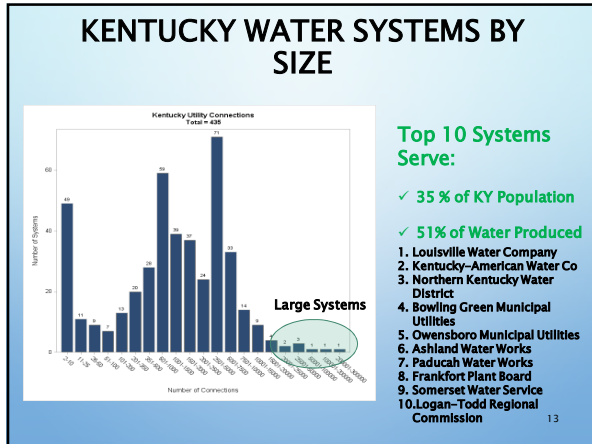
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### KENTUCKY WATER SYSTEMS

<b>Public Water Systems and Source:</b>
435 Public Water Systems (Total)
- 137 Surface Water (31%)
- 172 Surface Water Purchasers (40%)
- 101 Ground Water (23%)
- 25 Ground Water Purchasers (6%)
<b>Population Served:</b>
- 22% serve a population over 10,000
- 19% serve a population of 5,000 to 10,000
- 59% serve a population of less than 5,000
<b>Water Assets:</b>
- 213 Water Treatment Plants (average age 36 years)
- 1,842 Water Storage Tank (average age 26 years)
- 58,783 total miles of Water Main (average age 38 years)
- 11,697 miles of Water Main more than 50 years of age (19.9%)

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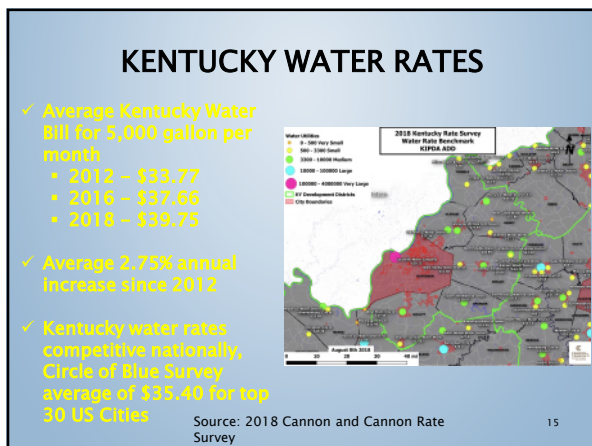
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## KENTUCKY WATER LOSS

- ✓ **Kentucky Water Loss averages 29 percent**
- ✓ **National Best Practice and KY PSC at 15%**
- ✓ **Needs Improvement**

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## KENTUCKY DRINKING WATER COMPLIANCE

- ✓ **Past 10-year trend less than peak of 1,400+ Violations in FY 2006-07**
- ✓ **Increase in 2014 for Disinfection By-Product Violations**
- ✓ **Decline in Violations last 4 years since 2014**
- ✓ **Expect improvement again in 2018 and 2019**

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## KENTUCKY DBP COMPLIANCE

- **2013 New EPA Disinfection By Product Rule**
- **DBP Violations increases from 2014 to 2016**
- ✓ **Decline in DBP Violations in 2017 with technical assistance from KDOW and KY Rural Water**
- ✓ **Expect DBP Improvement again in 2018 and 2019**

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## KENTUCKY LEAD COMPLIANCE

- ✓ All 435 Public Water Systems in Compliance with Lead and Copper Rule
- ✓ Kentucky in good shape if LCR Action Level reduces to 10 parts per billion (ppb)
- ✓ EPA estimates KY has 53,000 Lead Service Lines
- ✓ KY estimates less than

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## KENTUCKY WATER SYSTEM RESILIENCE

- ✓ Kentucky has significantly reduced its drought risk, with less than 1% of population in drought high risk areas
- ✓ Only 3 Southeastern Counties in *High Risk* category
- ✓ Kentucky Rural Water coordinates KY WARN

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## EPA DRINKING WATER NEEDS ASSESSMENT

- 2011 EPA Survey identified \$6.2 billion KY Need
- 2018 EPA Survey identified \$8.2 billion KY Need (a 32% increase since 2011)

Area	\$Millions	Percent
Transmission and Distribution	\$ 6,320.70	76.8%
Treatment	\$ 929.70	11.3%
Storage	\$ 648.80	7.9%
Source	\$ 206.70	2.5%
Other	\$ 126.20	1.5%
<b>Total</b>	<b>\$ 8,232.10</b>	<b>100.0%</b>

Source: 2018 EPA Published Drinking Water Needs Survey (data from 2016)

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### Summary Best Practice Areas to Celebrate

1. Consolidation of KY systems by over 80 % decline since 1974 (national best practice)
2. 97% public water service available to KY through 57,000 miles of pipe (top 5 is US)
3. KY advisory council – stakeholder group for collaboration (national best practice)
4. Compliance with lead and copper rule
5. KY drought risk significantly mitigated since 2010
6. Water quality – DBPs beginning to decline
7. Competitive water rates
8. Access to federal and state funding for water projects



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### SUMMARY CHALLENGES AND AREAS TO IMPROVE



1. Improve water loss and leak detection
2. Continue to reduce Disinfection By-Products
3. Adopt "Cost of Service" rate methodology and full cost pricing of water
4. Recruit and develop managerial and technical capacity and expertise in water
5. Improve access to funding
6. Promote the value of water in our communities

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### MANAGERIAL AND TECHNICAL CHALLENGES IN KENTUCKY

1. Aging workforce and retirement of baby boomers with extensive knowledge
2. Challenge in attracting new talent into water industry (managers, engineers, operators)
3. Need to recruit managerial and technical capacity/expertise in water
4. Need for training and development, especially for smaller water systems
5. Need to adopt best practices into utility operations
6. Continued consolidation will provides economies of scale and accelerate adoption of best practices





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**CAPITAL PLANNING NEEDED**

**Best Practices in Water include:**

1. **Condition Assessment** – the evaluation of the condition and performance of assets
2. **Asset Management** – a comprehensive approach to managing the assets of the Water/WW utility
3. **Capital Planning** – the projection of future Water/WW capital needs over 5, 10, 20 years
  - > Source water
  - > Treatment
  - > Sewer



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**Recommendations**

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**KENTUCKY WATER SYSTEM RECOMMENDATIONS**

1. Continue regional water planning and coordination of drinking water infrastructure
2. Maintain and enhance the Kentucky Water Resource Information System (WRIS)
3. Continue updates of the 20-year drinking water infrastructure needs assessment every three to five years
4. Promote the use of cost-of-service water rate methods and full-cost pricing of water as defined in AWWA M-1 Manual on Water Rates, Fees, and Charges. Full-cost pricing will allow for water systems to build, operate, maintain, and reinvest in their water systems and provide safe, reliable drinking water supply to their community.

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**KENTUCKY WATER SYSTEM  
RECOMMENDATIONS**

5. Conduct a statewide assessment of water loss and promote the use of the AWWA M-36 Water Audit and Loss Control methodology to reduce water loss
6. Pursue water system mergers and regional solutions where economically beneficial
7. Continue grant and low-interest loan programs offered by federal and state funding agencies (ARC, AML, CDBG, KIA, RD, SRF)
8. Pursue new sources of state and local funding for water infrastructure to bridge the funding needs gap and leverage federal and private investment in water infrastructure
9. Monitor the development of regulations for emerging contaminants (pharmaceuticals, personal care products, herbicides, and pesticides) in drinking water and identify the infrastructure improvements needed to comply with future regulations

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**KENTUCKY WATER SYSTEM  
RECOMMENDATIONS**

10. Promote the use of best practices in water treatment and optimization of disinfection methods to reduce byproducts of disinfection
11. Conduct a state-wide inventory of public lead service lines and promote best practices for corrosion control, lead service line replacement, and public education on lead in drinking water
12. Develop a state-wide program for voluntary testing of lead in public schools through a partnership with the Kentucky Environmental Protection Cabinet, Department of Public Health, Department of Education, and drinking water providers
13. Develop proactive programs for recruiting and retaining plant and distribution operators

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**Questions and Discussion**

**Contact Info:**

**Greg C. Heitzman, P.E.**  
[www.bluewaterky.com](http://www.bluewaterky.com)  
 gheitzman@bluewaterky.com  
 502-533-5073

  
 BlueWater  
 Kentucky

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STOLL KEENON OGDEN   
PLLC

**REGULATORY ISSUES IN THE  
CONSTRUCTION AND FINANCING OF  
WATER AND WASTEWATER  
FACILITIES**

Gerald Wuetcher  
Stoll Keenon Ogden PLLC  
gerald.wuetcher@skofirm.com  
<https://twitter.com/gwuetcher>  
(859) 231-3017

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STOLL KEENON OGDEN   
PLLC

**ORDER OF PRESENTATION**

- Who Must Obtain PSC Approval?
- What Projects Require PSC Approval?
- Preparing the Application
- Suggested Approaches For Obtaining PSC Approval

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STOLL KEENON OGDEN   
PLLC

**WHO MUST OBTAIN PSC  
APPROVAL?**

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## Feel like you are drowning?

Rosemary Tutt  
Kentucky Public Service Commission  
Consumer Services Branch  
(502) 564-3940

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## Regulation of Water Utilities in Kentucky

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### Water Service Regulation in Kentucky is Divided

- Federal water quality standards for all service providers are enforced by the Kentucky Division of Water – Compliance and Technical Assistance Branch
- Kentucky Public Service Commission regulates rates and service of only some water utilities

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### Kentucky Public Service Commission

- Created by the General Assembly in 1934
- Independent regulatory agency
- PSC does not set water or energy policy or broad utility regulatory policies
- Operates in accordance with statutes, regulations and judicial precedent

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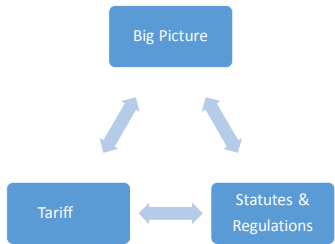
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### Don't Drown Look Around



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### PSC Mission Statement

- To ensure that utility rates are fair, just, and reasonable for the services provided and that those services are adequate, efficient, and reasonable.

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### PSC Reorganization – Impact on Water Utilities

- Creates New Division of Inspections
  - › Doubles water inspector positions to 2
- Emphasis on frequency of inspections
  - › Shorten standard inspection cycle – Currently 3 years
  - › Implement Water Utility Risk Assessment to determine frequency of inspection cycle - Risk factors include:
    - Compliance history – deficiencies / failure to correct
    - Unaccounted for water loss %
    - Construction activity
    - Date of last inspection
- Improves inspection process
  - › Timely reporting / more attention to deficiencies correction

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### Improving the Inspection Process

- Division of Inspections created to make the inspection and investigation processes more efficient, timely and consistent
  - › Sole focus is inspections and investigations
  - › Inspection reports issued within a 30-day target
  - › Accident investigation reports provided to utility upon completion by PSC staff, not when PSC decides on the course of action

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### Inspections – Points of Emphasis

- Identify Deficiencies
- Corrective actions
- Prompt follow-up
- Risk assessment - New
- Unaccounted-for Non-revenue water

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**Unaccounted-For Water Loss**

- What is the definition of Unaccounted-for (UAF) Water loss?
  - › Water produced or purchased less:
    - Water sold
    - System uses – flushing / plant / etc
    - Fire department
  - › Remaining balance is UAF water loss
    - Leaks identified but not repaired is included as part of UAF water loss

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**Unaccounted-For Water Loss**

- UAF Water loss exceeding 15% is nationally recognized as excessive
  - › No enforceable PSC standard for excessive water loss
  - › UAF water loss over 15% is non-recoverable in rates
  - › Many jurisdictional water utilities have water loss rates in excess of 15% - 6 over 40% and 11 between 30% & 40%

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**Unaccounted-For Water Loss**

- Excessive water loss threatens utilities financial viability
  - › ALL water loss has an inherent cost
  - › Water utilities with UAF water losses above 15% are considered excessively inefficient and costly
  - › Utilities incur costs to produce or purchase water that is unavailable for sale because it never reaches the customer
  - › Financial losses limit a utility's ability to reinvest in new infrastructure and repairs
  - › Failing infrastructure worsens the water loss problem and creates a vicious cycle

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**Unaccounted-For Water Loss**

- Excessive water loss will be a primary focus of PSC interactions with water utilities
  - › PSC’s position is that excessive water loss poses a threat to the utility’s financial and operational stability & viability
  - › **Point of emphasis at PSC training seminars**
  - › UAF water loss exceeding 15% will be cited as a deficiency by water system inspectors
  - › Rate cases, purchased water adjustments, CPCNs and water financing cases will all include language on UAF water losses in excess of 15%
  - › A utility’s inability or continued inaction to reduce UAF water losses will lead to greater PSC attention

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**Unaccounted-For Water Loss**

- Excessive water loss focus of PSC interactions with water utilities
  - › Annual Reports are being reviewed to identify utilities with UAF water loss in excess of 25%
  - › Financial impacts calculated and offending utilities will:
    - Receive letter with \$ costs, copying water commissioners and where applicable, the County Judge Executive
    - Listed on PSC website with \$ impact
  - › PSC will consider utility requests for surcharges to assist in financing UAF water loss reduction efforts

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**Unaccounted-For Water Loss**

- Purchase Water Adjustments when the utilities most recent annual report exceeds 15%
  - › “The Commission notes that in its 2015 Annual Report [utility] reported a water loss of XX.XXXX percent. [Utility’s] application provides updated purchases and sales information for a more current period than the 2015 Annual Report. Commission regulation 807 KAR 5:066(6)(3) states that for rate making purposes a utility’s unaccounted-for water loss shall not exceed fifteen (15) percent of total water produced and purchased, excluding water consumed by a utility in its own operations. Based upon the updated information in the application and the percentage of other water consumed by the utility in its 2015 Annual Report, [utility’s] unaccounted-for water loss is determined to be XX.XX percent for the updated period.

Reduction of [utility’s] unaccounted-for water loss to 15 percent would result in an approximate \$xxx,xxx.xx decrease to purchased water expense. Potentially, [utility] is paying \$x.xxx per 1,000 gallons sold, for expenses associated with unaccounted-for water loss in excess of the allowable 15 percent threshold.

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### Unaccounted-For Water Loss

- Purchase Water Adjustments – Continued when the utilities most recent annual report exceeds 15%

The Commission is placing greater emphasis on monitoring utilities that consistently exceed the fifteen (15) percent unaccounted-for water loss threshold and strongly encourages [utility] to pursue reasonable actions to reduce its unaccounted-for water loss. Failure by [utility] to make significant progress towards reducing unaccounted-for water may cause the Commission to pursue additional action with the utility."

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### Unaccounted-For Water Loss

- Water Financing or CPCN Order – example

› "The Commission notes that in its 2016 Annual Report "Utility" reported a water loss of 18.5072 percent. Commission regulation 807 KAR 5:066(6)(3) states that for rate making purposes a utility's unaccounted-for water loss shall not exceed fifteen (15) percent of total water produced and purchased, excluding water consumed by a utility in its own operations.

The Commission is placing greater emphasis on monitoring utilities that consistently exceed the fifteen (15) percent unaccounted-for water loss threshold and strongly encourages "Utility" to pursue reasonable actions to reduce its unaccounted-for water loss. Failure by "Utility" to make significant process towards reducing unaccounted-for water loss may cause the Commission to pursue additional action with the utility."

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### Unaccounted-For Water Loss

- Inspection Language – example

Public Service Commission staff performed a periodic inspection of the [utility] Water District water system on February 15, 2017, reviewing utility operations and management practices pursuant to Commission regulations. The report of this inspection is enclosed with this letter.

Based on the inspector's observations, the following deficiencies were identified: [Utility] Water District is failing to operate its facilities so as to provide adequate and safe service to its customers as required by 807 KAR 5:066, Section 7, due to water loss exceeding 15 percent. According to [utility] Water District's annual report for 2015, unaccounted-for water loss equaled approximately 29.24 percent of the District's total water purchased. The District purchased \$xx,xxx of water that cannot be recovered for rate making purposes.

For the deficiencies listed above, an explanation of why these deficiencies occurred and how these deficiencies will be remedied and prevented in the future needs to be provided.

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### Water Commissioners

- Duties and powers of water district commissioners (KRS 74.070, 74.080)
  - › Authority over all district powers, business and actions
  - › Determine rates and regulations, subject to PSC approval
  - › Enter into contracts, take legal actions
  - › Hire manager
  - › Adopt bylaws

BOTTOM LINE: Water district board, as a group and individually, is ultimately responsible for every aspect of a district's operations.

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### Looking Ahead and Moving Forward

- Challenges for all utilities
  - › Aging infrastructure / Inadequate capital funding
  - › Competition for limited government loans & grants
  - › Cyber Security threat
- Challenges for (sm)all water utilities  
(Per National Regulatory Research Institute 2013 Report)
  - › Reluctance to raise rates
  - › Financial instability
  - › Unfamiliar with regulatory processes
  - › Technologically challenged

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### Looking Ahead and Moving Forward

- PSC has implemented many NRRI identified best practices for regulating small water utilities
  - › Offering electronic filing
  - › Simplified rate application process
  - › Availability of Staff assistance
- PSC has no interest in Bureaucratic interference
- PSC only interested in promoting financially stable & viable water utilities that are able to reinvest in their infrastructure and provide high quality, reliable, long term service

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Questions?

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STOLL KEENON OGDEN PLLC 

### PUBLIC SERVICE COMMISSION

- Regulates **Utilities** & Enforces KRS Chapter 278
- Has Exclusive Jurisdiction Over **Utility** Rates & Service
- Investigates the Methods & Practices of **Utilities** To Require Conformance With KRS Chapter 278

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### WHO IS A UTILITY?

- Investor-Owned Water & Sewer Service Providers KRS 278.010(3)
- Water Districts KRS 278.015
- Water Associations KRS 278.012
- WD/WA Sewer Operations

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### WHO IS **NOT** A UTILITY?

- Municipal Utilities
- Metropolitan Sewer Districts
- Joint Sewer Agencies
- Sanitation Districts
- Water Commissions

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STOLL KEENON OGDEN PLLC 

## WHAT PROJECTS REQUIRE PSC APPROVAL?

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### KRS 278.020(1)(a)

No person, partnership, public or private corporation, or combination thereof shall . . . **begin the construction of any plant, equipment, property, or facility** for furnishing to the public any of the services enumerated in KRS 278.010, except . . . **ordinary extensions of existing systems in the usual course of business**, until that person has obtained from the Public Service Commission a certificate that public convenience and necessity require the service or construction.

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### PROJECTS REQUIRING A CERTIFICATE

- Construction of Any Plant or Facility
- Installation of Equipment on Large Scale (e.g., metering equipment)
- Repurposing of An Existing Facility
- Pre-Construction Contracting
- Acquisition of Facility???

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**DOES NOT REQUIRE A CERTIFICATE**

- Purchase of Building or Land
- Maintenance/Replacement Projects
- Demolition/Destruction of Existing Facility
- Acquisition of Non-Jurisdictional Facilities
- **Extensions In the Ordinary Course**

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**EXTENSIONS IN THE ORDINARY COURSE**

"A certificate of public convenience and necessity shall not be required for extensions that do not create wasteful duplication of plant, equipment, property or facilities, or conflict with the existing certificates or service of other utilities operating in the same area and under the jurisdiction of the commission that are in the general or contiguous area in which the utility renders service, and that do not involve sufficient capital outlay to materially affect the existing financial condition of the utility involved, or will not result in increased charges to its customers."

807 KAR 5:001, §13(3)

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**EXTENSIONS IN THE ORDINARY COURSE: THE FACTORS**

- No **Wasteful** Duplication of Plant or Facilities
- No Conflict With Existing Certificates or Service of Other Utilities
- Capital Outlay Is Insufficient to **Materially Affect** Existing Financial Condition of Utility
- Will Not Result In **Increased Charges** to Customers

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### EXTENSIONS IN THE ORDINARY COURSE: WASTEFUL DUPLICATION

- “Excess of Capacity Over Need”
- “Excessive Investment In Relation To Productivity” – Investment’s Cost-effectiveness
- Unnecessary Multiplicity of Physical Properties
- Premature Replacement
- **Any Duplication Requires Formal Review**

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### EXTENSIONS IN THE ORDINARY COURSE: MATERIALLY AFFECT

- Percentage of Net Utility Plant
  - Ordinary if less than 10% (**Abandoned**)
  - 2 Percent Rule (Staff Opinions)
  - 1 Percent Rule – Case No. 2014-00171
- Revenue Neutral – Project generates sufficient revenues to meet expense, then Ordinary
- Debt-Financed (**Conflicting Opinions**)

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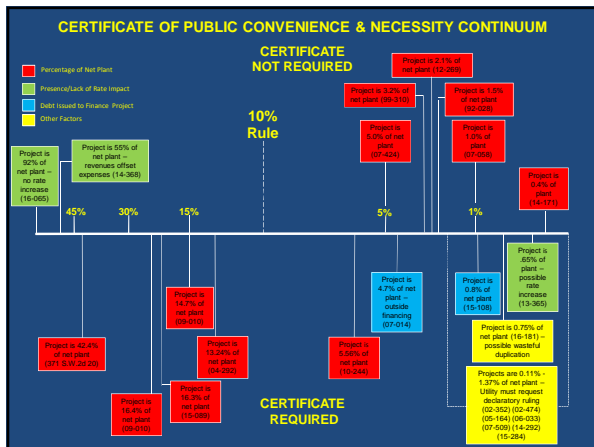
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### "BRIGHT LINE TEST"

- Recently added to KRS 278.020(1)
- No Certificate of Public Convenience & Necessity if:
  - Total Cost < \$500,000 **OR**
  - Project does not involve issuance of debt requiring PSC approval AND no rate increase will result
- Applicable only to **Class A & B** Water Districts & Associations
- Applies to **"water line extension or improvement project"**

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### "BRIGHT LINE TEST"

- PSC Has Limited Applicability To Water Mains
- Case No. 2016-00255 – Installation Of An Automated Meter System (08/03/2016)
- Held: "[T]he proposed installation of the new metering system is not a 'waterline extension or improvement project,' as it **does not extend or improve an existing waterline**"
- Adopts reasoning of PSC Staff Opinion No. 2012-024 (12/19/2012)

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### "BRIGHT LINE TEST"

**Is a "water main improvement project" limited to construction of water mains only?**

- PSC Staff Opinion No. 2017-002
- Water Association proposes to construct water booster station, including 300 feet of 2" water line, & install pressure reducing valve
- PSC Staff: "[T]he project improves existing water lines and qualifies as a 'water line extension or improvement project.'"
- Project involving non-mains may qualify if beneficial effect on existing water mains

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### METHOD OF ANALYSIS

- Bright Line Test Applicable?
  - Water Main Extension or Improvement?
  - \$500,000 or less?
  - No debt issued & no rate increase required?
- Construction of Facility OR Large Scale Installation of Equipment?
- Purchase?
- Replacement/Maintenance?
- Directly Debt Financed?
- Percentage of Net Utility Plant

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### WHEN IN DOUBT

- CYA: Private Attorney Opinion Letter
  - Rigorous/Thorough Analysis Essential
- Avoid Requests for Staff Opinion
- DO **NOT** Request A Deviation - Not Permitted Under Statute
- Request Declaratory Order
- File Application for a Certificate

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### CONSTRUCTING WITHOUT CERTIFICATE: CONSEQUENCES

- Assessment of \$2,500 Penalty To:
  - Utility
  - Utility Management
  - Engineering Firm/Contractors
- Injunctive Relief
- Does Not Affect Rate Recovery

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## PREPARING THE APPLICATION FOR A CERTIFICATE

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## CONTENTS OF APPLICATION

- Facts to Show Public Convenience & Necessity Require Project
- Franchises/Permits
- Full Description of Proposed Location/Route of Facilities
- Description of Manner of Construction
- Maps/Drawings/Specifications
- Method For Financing the Proposed Project

807 KAR 5:001, § 15

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## DEMONSTRATING NECESSITY

- Condition of Existing Facilities
- Ability to Meet Existing Demand/Future Demand
  - Adequate Service: Sufficient Capacity to meet the maximum estimated requirements during the year
- Availability of Other Sources
- Technical Feasibility
- Economic Feasibility
  - Least Cost vs. Most Reasonable
  - Duplication of Facilities Not Necessarily Fatal

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### DEMONSTRATING NECESSITY: PART II

- Full and Complete Narrative in Application
- Preliminary/Final Engineering Reports
- Written Testimony
  - Historical Background
  - Opportunity to Address Critical Issues
  - Explain Engineering Aspects of Application
  - Best Opportunity to Present Case for Certificate
- Other Studies (e.g. hydraulic studies)

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### PERMITS

- List /Provide Evidence of Required Permits
  - Division of Water Approval of Plans & Specifications
  - Discharge Permits
  - Army Corp of Engineer Permits
  - Highway Encroachment Permits
  - Historical/Preservation Permits
- Note Status of Obtaining Easements
- PSC is **Last Stop**: Request Deviation from Filing Requirements if Any Permits Not Yet Obtained

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### PROCEDURE

- Application
- Discovery
- Interested Parties May Intervene, But Generally No Intervenors
- Hearing on Application Seldom Held
- Final Order: 90 – 120 Days from filing of Application

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## TIMING

- Obtain PSC Approval Prior to Executing Construction/Materials Contract
- File Application after selecting winning bid if possible
- Alert PSC to Timing Requirements for Final Decision (Remind Frequently)
- If Selecting Contract Prior to Final PSC Order, Make Contract Contingent on Grant of Certificate

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STOLL KEENON OGDEN  PLLC

## SUGGESTED APPROACHES TO OBTAINING PSC APPROVAL

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## EXPEDITING PSC REVIEW

- Use Electronic Filing Procedures
- Pre-Filing Conference with PSC Staff
- Confer with AG re: Application
- Advise PSC of Critical Dates
- Advise PSC Staff of Willingness to Accept Informal Discovery Procedures
- Post-Filing Informal Conference

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### EXPEDITING PSC REVIEW

- Use Filing Checklists
- Include Written Testimony with Application
- Ensure Any Document Prepared By Professional Engineer Are Stamped/Signed
- Periodic Inquiries to PSC Staff/Executive Director

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### RURAL DEVELOPMENT FUNDING: AVOIDING PSC REVIEW

- KRS 278.023 requires expedited review of RD-funded Projects
- Legislature Assumes RD has adequately reviewed project – Two reviews unnecessary
- Project must be part of Financing Agreement between RD or HUD and WD or WA
- Utility Files Limited Documentation

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### RURAL DEVELOPMENT FUNDING: AVOIDING PSC REVIEW

- PSC may recommend changes to proposed construction
- PSC must **APPROVE** the project within 30 days of completed application
- Approval includes all actions necessary to implement agreement (rates, financing, certificate)

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STOLL KEENON OGDEN  
PLLC



**QUESTIONS?**

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859-231-3017  
<https://twitter.com/gwuetcher>

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STOLL KEENON OGDEN  PLLC

## SO YOU GOT CAUGHT?

### SHOW CAUSE PROCEEDINGS BEFORE THE PUBLIC SERVICE COMMISSION

Damon R. Talley  
Gerald Wuetcher  
Stoll Keenon Ogden PLLC

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## ORDER OF PRESENTATION

- Statutory Authority
- Enforcement Methods
- Show Cause Procedure
- Mitigating Violations/Sanctions
- Avoiding Violations

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STOLL KEENON OGDEN  PLLC

## STATUTORY AUTHORITY

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**STATUTORY AUTHORITY**

- KRS 278.040(1): PSC shall regulate utilities and shall have the power to enforce provisions of KRS Chapter 278
- KRS 278.040(2):
  - PSC’s jurisdiction extends to all utilities in state
  - PSC shall have exclusive jurisdiction over utility rates and service

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**STATUTORY AUTHORITY**

- KRS 278.040(3): “PSC may **investigate** the methods and practices of utilities to **require them to conform** to the laws of the state and to all reasonable rules, regulations and orders of the commission”
- KRS 278.250: PSC may investigate condition of utility

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**STATUTORY AUTHORITY**

- KRS 278.260(1): PSC may initiate investigations into rates & service on its own motion
- KRS 278.270: PSC has power to order changes in rates after hearing upon reasonable notice to utility
- KRS 278.280(1): PSC has power to require changes in rules, methods, practices, equipment after hearing upon reasonable notice

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**STATUTORY AUTHORITY**

- KRS 278.310: PSC may establish rules for hearings and investigations
- PSC KRS 278.320: PSC may issue subpoenas, subpoenas duces tecum, & necessary process
- KRS 278.330: PSC may take sworn testimony & may compel obedience to orders to give testimony & subpoenas through application to Circuit Court

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**STATUTORY AUTHORITY**

- KRS 278.390: PSC may compel obedience to its orders by proceedings in Franklin Circuit Ct
- KRS 278.990: PSC may assess civil penalties

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STOLL KEENON OGDEN PLLC 

**ENFORCEMENT METHODS**

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**ENFORCEMENT METHODS**

- PSC Order Directing Action or Non-Action
- Injunctive Relief from Circuit Court
- Referral for Criminal Prosecution
- Assessment of Civil Penalties
- Removal of WD Commissioners

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**PSC ORDER**

- Has force of law
- Order remains in effect until:
  - Expires
  - PSC revokes or modifies
  - Court suspends or vacates

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**PSC ORDER**

- May prohibit action temporarily without holding hearing
- After hearing may require utility to act or refrain from acting permanently
- May require compliance with statute or regulation without hearing

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### INJUNCTIVE RELIEF

- KRS 278.390: PSC may request injunctive relief from Court to enforce its Orders
- Court orders utility to comply with PSC Order
- Contempt of court proceedings available if utility or its officers do not comply with court's order

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### CRIMINAL REFERRAL

- KRS 278.990(1): **ANY PERSON** who violates KRS Ch. 278, PSC Reg or Order may be subject to **CRIMINAL PENALTY**
- Maximum: Six Months Imprisonment
- Misdemeanor Offense
- Must be prosecuted within one year
- District Court has jurisdiction/County Attorney prosecutes

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### CIVIL PENALTY

- KRS 278.990(1) authorizes PSC to assess civil penalties
- **WILLFUL VIOLATION** required
- Minimum: \$25/Maximum: \$2,500
- Penalty may be assessed for **each offense**
- Action may constitute multiple offenses

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**WHAT IS A WILLFUL VIOLATION?**

- “[A]n act that is committed intentionally, not accidentally nor involuntarily.”
- “[A] willful violation has been explained as one which is intentional, knowing, voluntary, deliberate or obstinate, although it may be neither malevolent nor with the purpose to violate the law.”

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**WHAT IS A WILLFUL VIOLATION?**

- Does not require bad faith
- Lack of knowledge/ignorance of law is no excuse
- Good faith reliance on opinion of legal counsel re: legality of act – **NO DEFENSE**
- Reliance on lending institution or PSC Staff – **NO DEFENSE**

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**AGAINST WHOM CAN A PENALTY BE ASSESSED?**

Any **Utility** that **WILLFULLY**:

- Violates KRS Chapter 278
- Violates PSC Regulation
- Fails to Obey any PSC Order
- Does any act prohibited or fails to perform duty imposed by those statute or regulation

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**AGAINST WHOM CAN A PENALTY BE ASSESSED?**

- Employee's act may be imputed to utility
- KRS 278.990(1): "Each act, omission, or failure by an officer, agent, or other person acting for or employed by a utility and acting within the scope of his employment **shall be deemed to be the act, omission, or failure of the utility.**"

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**AGAINST WHOM CAN A PENALTY BE ASSESSED?**

Any **Utility Officer/Employee/Agent** or **Any Other Person** that **WILLFULLY** violates

- KRS Chapter 278
- PSC Regulation/PSC Order

**OR**

**WILLFULLY** procures, aids, or abets a violation by a **Utility**

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**"AIDING AND ABETTING"**

"**Help, assist, or facilitate** the commission of a crime, promote the accomplishment thereof, help in advancing or bringing it about, or **encourage, counsel, or incite** as to its commission. . . . It **comprehends all assistance** rendered by words, acts, encouragement, support, or presence, actual or constructive to render assistance if necessary."

Black's Law Dictionary (5<sup>th</sup> ed.) 63

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**EXAMPLES:  
“AIDING AND ABETTING”**

- Commissioners vote to issue a note with 4-year term without PSC authorization
- Commissioners sign a loan agreement with KIA without prior PSC authorization
- Commissioners OK start of construction of a building without obtaining a CPCN

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STOLL KEENON OGDEN PLLC 

**WHO CAN AID & ABET  
A VIOLATION?**

- Water District Commissioners
- Water Association Directors
- General Managers
- Legal Counsel
- Fiscal Agents
- Lending Institutions

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**PSC WARNING**

“Water District Commissioners should be advised that fines and penalties may be assessed against them individually for any such violations, as the Commission does not believe that . . . [water district’s] customers should bear the cost of civil penalties in their rates for the negligence or malfeasance of the Water District Commissioners.”

Case No. 2016-00400, Order of 1/5/2018 at 5-6.

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**PSC FINAL WARNING**

“To date the Commission has assessed, but not sought, to collect civil penalties against individual water district commissioners for essentially two reasons. First, the Commission's goal has been to obtain compliance with the requirements of the statute and not to exact a penalty and, second, the Commission was determined to send a message to these utilities and their local commissioners that they were out of compliance and future violations could result in individual penalties as well as a separate penalty against the utility.”

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**PSC FINAL WARNING**

“Water districts and their commissioners are hereby put on final notice that unauthorized debt incurred after the date of this order may well result in substantial civil penalties being assessed and collected against both in future show cause cases.”

Case No. 2017-00469, Order of 9/17/2018 at 7-8.

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STOLL KEENON OGDEN PLLC 

**REMOVAL OF WATER DISTRICT COMMISSIONERS**

- KRS 74.025 authorizes PSC to remove a water district commissioner
- A grounds for removal: failure to comply with rules, regulations, and orders issued by the Public Service Commission

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**REMOVAL OF WATER DISTRICT COMMISSIONERS**

- Other grounds
  - Incompetency
  - Neglect of Duty
  - Gross immorality
  - Nonfeasance - Misfeasance - Malfesance in Office

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STOLL KEENON OGDEN PLLC 

**PROCEDURE**

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**SHOW CAUSE PROCEEDING: PHASES**

- Preliminary Investigation
- Order To Show Cause
- Respondents' Response
- Discovery
- Hearing
- Final Order
- Appeal/Enforcement of Order

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### PRELIMINARY INVESTIGATION

- Initiated upon suspicion of unlawful conduct
- No formal proceeding required
- May be part of unrelated formal proceeding
- No notice required
- PSC may examine utility records without providing cause
- PSC may require submission of reports or information

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### ORDER TO SHOW CAUSE

- Describes Alleged Violation
- Identifies Statute or Regulation Violated/Source of Allegations
- Notice of Penalty
- Directs Response
- Establishes Hearing Date
- Sets Time to Request Staff Conference
- Orders Publication of Notice of Hearing

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### LEGAL REPRESENTATION REQUIRED

- Quasi-judicial proceeding
- Adversarial Proceeding
- Potential Adverse Consequences
  - Civil Penalties
  - **CRIMINAL PENALTIES**
  - Restrictions/requirements placed on utility
  - Adverse effect on reputation

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**LEGAL REPRESENTATION: ISSUES**

- Separate v. Joint Representation
  - Who does the water utility's attorney represent?
  - Potential Conflicts of Interest with Utility
  - Potential Conflicts with Other Utility Officers
  - Benefits/Disadvantages
- Who pays the legal fees?

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**RESPONSE TO ORDER**

- Written Response
  - Should I Respond?
  - Jt. vs. Individual Response
  - Potential Defenses
  - Mitigating Factors
- Waiver of Hearing
- Offer of Settlement/Conference with Staff

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**DISCOVERY**

- PSC Staff permitted to conduct discovery prior to/after hearing
- No statutory or regulatory authority for Respondents to Conduct Discovery
- PSC has refused to permit discovery on its Staff
- Why should Respondents conduct discovery?

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**HEARING**

- PSC Staff – Prosecutor
- Burden of Proof
- Order of Presentation of Evidence
- Compelling Respondents to Testify
- Witnesses
- Scope of Hearing/Relevancy of Inquiries
- Video Record/Streamed Live

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**FINAL ORDER**

- No required deadline for decision
- Must contain factual findings
- If violation or failure to comply found, order may impose sanctions
- Publicizing the Order

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**SANCTIONS PREVIOUSLY IMPOSED**

- Assessment of Civil Penalty
- Additional Proceedings re: Removal from Office
- Mandatory Attendance at PSC Water Management Training Programs
- Changes in Utility Practices and Procedures

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**SANCTIONS PREVIOUSLY IMPOSED**

- Suspended/Vacated Penalties
  - Conditions Imposed
  - Finding of Violation is usually not vacated

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**REQUEST FOR REHEARING**

- Affected Party may request rehearing from PSC within 23 days of Order
- Must show legal or factual error
- Offer additional evidence not available at time of hearing
- PSC has 20 days to rule on request

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**ACTION FOR REVIEW**

- May file action in Franklin Circuit Ct
- No request for rehearing required
- File within 33 days of Order (or 23 days after denial of rehearing)
- Must demonstrate Order is unlawful or unreasonable

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## MITIGATING VIOLATIONS/SANCTIONS

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### ACTIONS UPON RECEIPT OF SHOW CAUSE ORDER

- Investigate the alleged violation
- Identify:
  - Mitigating factors
  - Failures in processes/procedures
  - Actions to correct/prevent failures
  - Any **UNEXPLODED TIME BOMBS!**

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### ACTIONS UPON RECEIPT OF SHOW CAUSE ORDER

- Take corrective/preventive actions:
  - Develop and implement written polices and procedures
  - Provide additional training
  - Hire/retain resources or professionals necessary to prevent recurrence

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### WITNESS PREPARATION

- Prepare each witness for hearing
- Utility officials should:
  - Review incident
  - Be able to explain what happen
  - Identify mitigating factors
  - Describe and explain all corrective actions

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### WITNESS PREPARATION

- Utility officials should:
  - Be familiar with major aspects of utility's operation
  - Be familiar with utility's finances
  - Be familiar with laws governing utility's operations

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### POINTS TO EMPHASIZE

- Acknowledge any errors or mistakes
- Corrective Actions
- Preventive Measures
- Lack of previous violations

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**LEGAL DEFENSES**

- Statute of Limitations
- Immunity granted due to prior testimony
- Violation not willful
- Violation occurred prior to appointment to governing board

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STOLL KEENON OGDEN PLLC 

**AVOIDING VIOLATIONS**

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**AVOIDING VIOLATIONS**

- Know the Law
  - Maintain/improve your knowledge of legal requirements
  - Attend training programs
  - Encourage your employees to attend relevant training programs

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**AVOIDING VIOLATIONS**

- Retain Attorney on recurring basis to review Board actions
  - Ensure legal review of major actions
  - Have attorney attend board meetings
  - Legal review of board meeting agenda & minutes

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**AVOIDING VIOLATIONS**

- Review other utilities' violations - develop & implement procedures to avoid
- Have attorney review any application prior to filing for evidence of possible violations
- Audit your records
- When in doubt – seek legal opinion or apply to PSC for Declaratory Order

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**OTHER ACTIONS TO CONSIDER**

- Develop policy re: representation of Bd members and payment of legal costs
- Consider purchase of directors and officers liability insurance
- Document board meetings and discussions re: critical decisions
- Develop policy re: role of attorney in your utility

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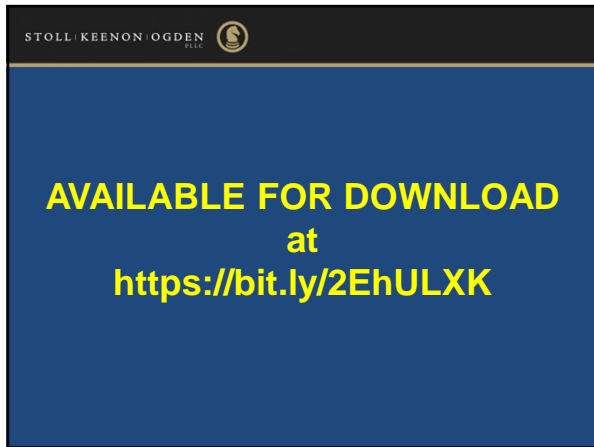
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## DISCUSSION TOPICS

For

### ATTORNEYS' PANEL DISCUSSION

**1. New Rules for Water Commissioner Training.** The Public Service Commission recently announced new rules for water district commissioner training. How will these new rules affect new commissioners? How will they affect commissioners that have already received new commissioner training?

**2. 911 Fees.** My water district is located in a county whose fiscal court has announced its intention to impose a fee on water service to finance 911 service. Under the proposed fee, water suppliers must collect the fee. The fee, however is imposed on the customers, not the water district. My commissioners considered opposing the fee but determined that such opposition would damage the water district's public image and its relations with fiscal court. They have chosen not to oppose the fee but still have some concerns regarding the fee's imposition. What are the potential problems of What actions would you recommend that the water district take to protect its interests.

**3. Show cause Orders from Public Service Commission.** My water district and its commissioners recently received an order for the Public Service Commission in which the Commission alleged that the water district had violated a provision of KRS Chapter 278 and that the water district's commissioners had aided and abetted the alleged violation. What general actions should a water district take when it receives such Order? What actions should its commissioners take? Can the water district's lawyer represent both the water district and the commissioners? If not, can the water district pay the water district commissioners' legal expenses to retain their own attorney? If the Public Service Commission assesses a fine or civil penalty against the water district commissioners, can the



water district pay the fine or reimburse the commissioners? If a fine or penalty is assessed against the water district, can the water district's commissioners be liable for the fine or civil penalty? What are the water district commissioners' rights in such a proceeding? What are the sanctions that the Public Service Commission can impose against the water district commissioners?

**4. Dealing with Public Service Commission Staff during Rate Cases.**

My water district has a rate case application pending before the Public Service Commission. Commission Staff has scheduled a field visit to review the water district's records. How should I and my staff approach this review? Should the water district's lawyer be present? How should my staff handle questions that Commission Staff poses or its requests for documents? What are my district's obligations to provide documents or records? Are there any documents or records that I can withhold from Commission Staff (for example, personnel records, litigation records)? What, if anything, should I do to document the visit? If my water district receives informal requests after the visit for more information, how should my water district respond?

**5. Application for Service.**

**a.** Should a water utility require new applicants for service to complete and sign an application form?

**b.** What conditions of service or requirements should be set forth in the application form/contract for service?

**c.** Should the Application form/service contract be filed with the Public Service Commission if the utility is regulated by the Public Service Commission?

**2. Automated Calls to Customers.** Many utilities are instituting automated calling systems that permit utilities to make voice calls or send text messages to customers to advise of boiled water advisories, water line flushing and due bills. What, if any, laws should a water utility consider before implementing such a system?

**3. Requesting PSC Staff Opinion.** Last year, I went to a seminar and learned that the PSC will issue a legal opinion to utilities if requested. **The opinion is free.** Should a utility request an opinion from the PSC Staff? If so, under what circumstances? Are there alternatives to requesting an opinion from the PSC Staff?

**4. Requesting AG Opinion.** The Office of Attorney General advertises that it will provide legal opinions for local governments, water districts, and other public agencies. **The opinions are free.** If my utility needs legal advice, should it request an opinion from the Attorney General's office? What are the downsides to asking for an AG opinion?

**5. Construction of New Office Building. Is a certificate of public convenience and necessity required?** My utility has been saving money to construct a new office building. What approvals, if any, does it need to obtain from the Public Service Commission before starting construction? Also, do we have to pay Prevailing Wages?

**6. Expansion of Existing Office Building. Is a certificate of public convenience of necessity required?** My utility just acquired another utility. We need to add a wing to our existing office building. Does it need to obtain permission from the Public Service Commission before starting construction? Also, do we have to pay Prevailing Wages? What if the water district employees do the work during "slow" times? Does this make a difference?

**7. Local Model Procurement Code.** What are the advantages and disadvantages of adopting the Local Model Procurement Code? Do many local governments and special districts adopt the Code?

**8. Termination of Water Service for Failure to Pay Sewer Bill.** My water district provides water to some customers who receive sewer service from the City. Some customers pay their water bill, but do not pay their sewer bill. The City wants the water district to “cut off” water service to those delinquent customers. Must my water district terminate water service to those customers? May my water district charge the City for turning off their water? What if the sewer service provider is another water district? Should the water district have a contract for terminating service?

**9. Termination of Water Service for Failure to Pay Other Bills Owed to City or County Governments or Other Special Districts.** Can my water district be required to bill for other governmental services such as garbage collection or storm drainage? If so, what are my district’s obligations to its customers? Does it need Public Service Commission approval? Can it terminate service for a customer’s failure to pay bills for those other services?

**10. Providing Other Services.**

**a.** My water district has been approached by a privately owned sewer utility about providing billing and collection services for it. May the water district provide such services?

**b.** Several out-of-state firms have approached my water district about advertising their water line warranty service. Under this service, the third party company charges a monthly fee or premium. In return, it will repair or replace a damaged water service line when the repair or replacement is needed.

Are there any approvals that my district needs to obtain before providing this service?

c. The county judge wants to find a better alternative to collecting county-wide garbage collection or solid waste fee. He has requested that the local water district bill and collect the fee and terminate water service to any person who fails to pay the garbage collection fee. Is this permissible? What, if any approvals are required?

**11. Investment Policy.** Does a water district need a written investment policy? In what investments can a water district invest its funds? **See KRS 66.480.**

**12. Bidding Requirements.** My water district provides water service to three different counties. When is it required to publish notice requesting bids to provide services or goods? Does it have to publish notice in each county?

**13. Cybersecurity.** Are there any specific laws or regulations that a water district must follow to protect its data?

**14. Out-of-State Bidders.** If an out-of-state entity bids on the project or a request to provide goods and services and is the successful bidder, are there any special requirements that a water district must observe before it can award the bid to the out-of-state firm?

**15. Whistle Blower Act.** There is something shady going on at my utility. I have to tell somebody. If I report this activity to the State Auditor, will I get fired? My friend works for the Federal Government. She says there is a federal Whistle Blower Act. Does Kentucky have a Whistle Blower Act? If so, am I covered?

**16. Purchase of Real Property at Public Auction.** My utility needs to buy land for a new water storage tank. We have had our eyes on a small farm

located at the top of a hill. Our new tank would work great at that location. The farm is being sold at public auction. The Kentucky Open Meetings Act really “ties our hands.” I know we can go into Executive Session to discuss this matter, but we cannot vote on anything while in Executive Session. If we make a motion in Open Session to buy the property, the whole world will know our plans. The auctioneer will run the price up on us. What do we do? Any advice?

**17. Email Communications with PSC.** The Public Service Commission has contacted my water district several times to inquire about its failure to submit required reports or answer correspondence. In each instance, the Public Service Commission official told us that it had sent the request or reminder by e-mail. Doesn't the Public Service Commission have to send its request by regular mail? What is the water district's obligation to maintain an e-mail address with the Public Service Commission? What e-mail address should we use? What is the water district's obligation to maintain a current e-mail address with the Public Service Commission? Who should be responsible for looking at the emails and distributing them to the appropriate person?

**18. Service Boundary Agreements.** There is an overlap in the City's water service area and my utility's service area. Developers are always trying to “play” one of us against the other to get the best deal possible. We are tired of this. The City has been talking to us about “dividing-up” the territory so there is a bright line separating our service areas. Is this legal? If we reach an agreement, will it be binding on future developers or customers? Does the agreement require Public Service Commission approval?

**19. Trading Customers.** Because of dead-end lines and low pressure, we are considering “giving” some of our customers to a neighboring utility. Is this

legal? Does it have to be an “even swap?” Do we have to charge the other utility or may we simply “give” the customers away? Do we have to tell the PSC?

**20. Customer Complaints.** Recently, my water district has had several irate customers complaining about customer service issues. Though it has tried to address these concerns, on several occasions it has been unsuccessful. The complaining customers have contacted the PSC’s Consumer Services Branch, who in turn have called us. On several occasions, the representative from the Consumer Services Branch has ordered us to take some action. Is the water district required to comply with the representative’s “Order”? What happens if the water district does not comply?

**21. Public Notice.** Several water utilities operate webpages. Some water utilities lack the resources to have a web page, but operate a Facebook page. Do water utilities that have either a webpage or Facebook page have any obligation to post notices on those sites when adjusting their rates for water service.