

# **EXHIBIT 3**

Revisions to Kentucky's Underground Facility Protection Statute

Randall Kelley  
Kentucky Rural Water Association

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2021 Revisions to the Kentucky Underground Facility Protection Act

- ◆ House Bill 303 (Santoro)
  - Industry Backed Overhaul Bill
- ◆ Senate Bill 172 (Howell)
  - Public Service Commission Cleanup Bill

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House Bill 303

- ◆ The most recent effort to revise the statute began three years ago; largely based on the work of KGA's Damage Prevention Committee
- ◆ The initial version of the recently passed legislation was developed by a working group comprised of more than 25 organizations over a two-year period

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## HB 303 Working Group

- 811
- Association of General Contractors
- Association of Master Contractors
- Atmos
- AT&T
- Big Rivers
- Columbia Gas
- Commerce Lexington
- Delta Natural Gas
- Duke Energy
- East Kentucky Power Company
- Energy and Environment Cabinet
- Greater Louisville Inc.
- Home Builders Association
- Kentucky American Water
- Kentucky Association of Counties
- Kentucky Association of Electric Cooperatives
- Kentucky Chamber of Commerce
- Kentucky Gas Association
- Kentucky Oil and Gas Association
- Kentucky League of Cities
- Kentucky Power
- Kentucky Rural Water Association
- Kentucky Telecom Association
- LG&E/KU
- Marathon Oil
- Northern Kentucky Chamber of Commerce
- Public Service Commission

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## HB 303- 2021 General Assembly

- Sponsored by Representative Sal Santoro (R-Boone)
- February 2<sup>nd</sup>, introduced in the House
- February 25<sup>th</sup>, passed the House 94-0 with two amendments
- March 12<sup>th</sup>, passed the Senate 31-0 with one amendment
- March 15<sup>th</sup>, received concurrence in the House 92-0
- March 23<sup>rd</sup>, signed by Governor Beshear
- January 1<sup>st</sup>, 2022, effective date

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## HB 303- Substantial Changes to Current Statute (Section 1- Definitions)

- Operator" means any entity or individual owning or operating underground facilities to serve the public, **but does not include any entity or individual owning or operating underground storage tanks that are subject to Subchapter 60 of KRS Chapter 224;**
- "Approximate location," when referring to an underground facility, means:
  - (a) For underground metallic facilities and underground nonmetallic facilities with metallic tracer wire, a distance not to exceed the combined width of the underground facility plus **twenty-four (24) [eighteen (18)]** inches measured from the outer edge of each side of the underground facility; or
  - (b) For **unmapped or untonable facilities [nonmetallic facilities without metallic tracer wire]**, the underground facility shall be located as accurately as possible from field location records and shall require notification from the operator of the inability to accurately locate the facility;

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HB 303- Substantial Changes to Current Statute (Section 1- Definitions)

- "Working day" means every day, except Saturday, Sunday, and holidays established by federal or state statute. For purposes of measuring any period of time prescribed or allowed under the Underground Facility Damage Prevention Act of 1994, a working day shall commence at 12:01 a.m. eastern time and end at 12 midnight eastern time excluding the day the locate request was made; ~~a twenty-four (24)-hour period commencing from the time of receipt of the notification by the Kentucky Contact Center except Saturday, Sunday, and holidays established by federal or state statute;~~
- "Positive response" means an automated or written communication system provided by each protection notification center for all locate requests the center receives pursuant to Section 2 of this Act that allows excavators, locators, operators, and other interested parties to determine the status of locating an underground facility and requires response and verification by operators and excavators to comply with their respective requirements of the Underground Facility Damage Prevention Act of 1994;

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HB 303- Substantial Changes to Current Statute (Section 1- Definitions)

- "Second notice" means a notice that is made by an excavator to a notification center when an operator has failed to comply with the positive response requirements under subsection (5) of Section 2 of this Act;
- "Tolerance zone" means a strip of land at least four (4) feet wide but not wider than the width of the underground facility plus two (2) feet on either side of the outer limits of the facility;
- "Untonable facility" means an underground facility that cannot be located from the surface using locating methods which meet industry standards and that requires additional efforts and extended time;
- "Fiber-to-the-premises" means a service that provides network connectivity between a location and a subscriber using fiber.

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HB 303- Substantial Changes to Current Statute (Section 2)

- (5) An operator shall respond to facility locate requests and provide a positive response as follows:
  - (a) To a normal excavation locate request, within two (2) working days after receiving notification from an excavator or any time prior to the scheduled excavation start date if agreed upon as provided in subsection (7) of Section 5 of this Act, excluding large project requests, design information requests, emergency locate requests, and unmapped or untonable facilities; ~~excluding large projects;~~
  - (b) To an emergency locate request, as quickly as possible but not to exceed forty-eight (48) hours after receiving notification from an excavator;
  - (c) To a design information request, within ten (10) working days after receiving notification from the person making the request; ~~and~~

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HB 303- Substantial Changes to Current Statute (Section 2)

(d) To a large project request, ~~within two (2) working days the operator shall notify the excavator that an excavation area has been determined to be a large project, and the operator shall respond to the request within five (5) working days from the later of receiving notification from an excavator or prior to the scheduled excavation start date for that location if agreed upon as provided in subsection (7) of Section 5 of this Act;~~

(e) To an unmapped or untonable facility request, ~~within two (2) working days the operator shall notify the excavator that an excavation area has been determined to be an unmapped or untonable project, and the operator shall respond to the request within five (5) working days for a normal locate request or eight (8) working days for a large project request from the later of receiving notification from an excavator or prior to the scheduled excavation start date if agreed upon as provided in subsection (7) of Section 5 of this Act; and~~

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HB 303- Substantial Changes to Current Statute (Section 2)

(f) ~~To a fiber-to-the-premises broadband deployment excavation request, in locations not already served by fiber-to-the-premises, within four (4) working days.~~

- (6) ~~Within one (1) working day after receiving a second notice request from an excavator pursuant to subsection (12) of Section 3 of this Act, an operator shall locate its facility and update the positive response system.~~

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HB 303- Substantial Changes to Current Statute (Section 2)

- (7) ~~An operator shall, after[upon] receiving an emergency locate request, [or] a normal excavation locate request, an unmapped or untonable locate request, or a large project request as provided in subsection (5) of this section:~~

(a) ~~Inform the excavator of the approximate location and description of any of the operator's underground facilities that may be damaged or pose a safety concern because of excavation or demolition;~~

(b) ~~Inform the excavator of any other information that would assist in locating and avoiding contact with or damage to underground facilities;~~

(c) ~~Unless permanent facility markers are provided, provide temporary markings to inform the excavator of the ownership and approximate location of the underground facility; and~~

(c) ~~Provide a positive response to the requesting party [Notify the requesting party if underground facilities are not in conflict with the excavation or demolition].~~

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HB 303- Substantial Changes to Current Statute (Section 2)

- ~~(11)(10)~~ If extraordinary circumstances exist, an operator shall notify the excavator of the operator's inability to comply with this section. **Notification under this subsection shall temporarily relieve the operator of complying with subsections (5) and (6) of this section until the operator can recover from the extraordinary circumstances. Extraordinary circumstances include weather that makes it impossible for any combination of facility markers identified in subsection (10) of this section to be used, extreme weather conditions, force majeure, disasters, or civil unrest that make timely response difficult or impossible.**

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HB 303- Substantial Changes to Current Statute (Section 3)

- (1) (e) Each excavator, or person responsible for an excavation, planning excavation, or demolition work shall, not less than two (2) full working days nor more than ten (10) full working days prior to commencing work, **unless a future start date is agreed upon as provided in subsection (7) of Section 5 of this Act, notify each affected operator's designated protection notification center** ~~operator~~ of the excavator's intended work and work schedule. ~~Contacting the applicable protection notification centers shall satisfy this requirement.~~
- (b) ~~[An excavator may commence work before.]~~ The two (2) full working days provided for in paragraph (a) of this subsection have elapsed if all affected operators have notified the person ~~that the location of all the affected operators' facilities have been marked or that they have no facilities in the area of the proposed excavation, demolition, or timber harvesting].~~

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HB 303- Substantial Changes to Current Statute (Section 3)

- (3) Each excavator shall provide each applicable protection notification center with adequate information regarding:
  - (a) Name and phone number of the excavator or person requesting the underground facility locate;
  - (b) Approximate location and type of work being performed by the excavator, including if the request involves a fiber-to-the-premises broadband deployment excavation;
  - (c) Name and phone number of work site contact;
  - (d) Estimated start date and start time of excavation; and ~~the name of the individual making the notification;~~
  - (b) ~~The excavator's name, address, and a telephone number;~~ (c)

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HB 303- Substantial Changes to Current Statute (Section 3)

- (e) The excavation or demolition site location or locations, each of which shall not exceed five thousand (5,000) ~~two-thousand (2,000)~~ feet in length unless the excavator and operator agree to a larger area, the city or community, county and street address, including the nearest cross street;
- (d) The type and extent of excavation or demolition to be performed;
- (e) A contact name and telephone number of the person responsible for the work to be performed.

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HB 303- Substantial Changes to Current Statute (Section 3)

- (7) If, after the response time ~~two (2) day period~~ provided by KRS 367.4909(5)(a), the excavator finds evidence of an unmarked underground facility at the site, he shall immediately notify a ~~the~~ protection notification center. **When an excavator has complied with subsection (1) of this section and evidence of an unmarked underground facility is uncovered, the operator shall have six (6) business hours to identify the underground facility.**

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HB 303- Substantial Changes to Current Statute (Section 3)

- (10) When excavation or demolition is necessary within the tolerance zone ~~approximate location of the underground facility~~, the excavator shall hand-dig or use nonintrusive means to avoid damage to the underground facility, **except that mechanized equipment may be used:**
  - (a) To remove the pavement or other manmade hard surface if used during the initial penetration only to the depth necessary and if an individual other than the equipment operator visually monitors the excavation activity;
  - (b) To remove indigenuous rock if used during the initial penetration only to the extent necessary, if an individual other than the equipment operator visually monitors the excavation activity, and if the excavation is planned to avoid damage to the underground facility. However, if the underground facility contains flammable, toxic, corrosive, or hazardous products, the excavator shall notify the facility owner of the excavator's intent prior to removing indigenuous rock;

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HB 303- Substantial Changes to Current Statute (Section 3)

- (c) To remove materials that are more than twelve (12) inches in any direction from the outer edge of the located facility if the excavator visually identifies the precise location of the underground facility or visually confirms that no facility is present within the depth of the excavation, if an individual other than the equipment operator visually monitors the excavation activity, and if the excavation is planned to avoid damage to the underground facility; and
- (d) To place shores into an existing excavation or remove shores from an existing excavation.

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HB 303- Substantial Changes to Current Statute (Section 3)

- o (12) If an operator has failed to give a positive response within the timeframes provided in subsection (5) of Section 2 of this Act, the excavator shall submit a second notice to the protection notification center. If one (1) working day after receiving a second notice request as provided in subsection (6) of Section 2 of this Act, the operator has still failed to give a positive response, an excavator that has fully complied with this section shall not be deemed liable for any damages to an underground facility that would have been located if the operator had complied with the operator's duties under Section 2 of this Act, except for damages to a person or an underground facility due to negligence or intentional misconduct of an excavator. This subsection shall not apply to any underground facility used to transport gas or hazardous liquid subject to the federal pipeline safety laws, 49 U.S.C. secs. 60101 et seq.

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HB 303- Substantial Changes to Current Statute (Section 4)

- o (1) All [Each] protection notification centers [center] shall:
  - (a) Provide locate request services during working days and provide an emergency contact number for incidents occurring outside the working day [Operate the protection notification center during all working days];
  - (b) Provide a positive response system for excavators, locators, operators, and other interested parties to determine the status of locating an underground facility;
  - (c) Provide any excavation request with an identification number and the names of the facility owners or operators who will be notified for each locate request [Provide a locate request identification number to the excavator for each excavation or demolition location request];
  - (d) [(c)] Promptly after receiving an excavation or demolition work notification from an excavator, provide to each of its affected operator members the excavator information required by KRS 367.491(3);

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HB 303- Substantial Changes to Current Statute (Section 4)

~~(e)~~**(d)** Maintain a list of all its operator ~~members~~**member identities**, their business ~~addresses~~**addresses** and their business and emergency telephone numbers and ~~provide~~**record** this information in accordance with KRS 64.012 with the county clerk of each county where the operator member has underground facilities. The county clerk shall provide this information upon request for the actual cost of providing a copy, to be paid by the requesting party to the county clerk. The county clerk shall assume no liability associated with the receipt of this information from the protection notification center or for subsequent provision of this same information to the requesting party;

~~(f)~~**(e)** Make the operator members information list available to any person for inspection at its place of business without charge or provide a copy of the list to any person for any county upon request for a fee not to exceed the actual cost of providing a copy;

~~(g)~~**(f)** Define and adopt policies and procedures for processing design information requests; and

~~(h)~~**(g)** Provide the person making a design information request a list of identified operators that will receive notification and notify those operators;

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HB 303- Substantial Changes to Current Statute (Section 4)

**(l)** Maintain the following information provided by excavators for all requests to locate facilities for at least five (5) years from the date of the request:

- 1. Name and phone number of the excavator or person requesting the underground facility locate;
- 2. Location and type of work being performed by the excavator;
- 3. Name and phone number of work site contact;
- 4. Name, address, and phone number of underground facility operators; and
- 5. Estimated start date and start time of excavation;

**(j)** Provide contact information for the protection notification center on its Web site or pursuant to paragraph (e) of this subsection; and

**(k)** Provide public awareness education and damage prevention programs in the manner and amount determined by each protection notification center.

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HB 303- Substantial Changes to Current Statute (Section 4)

**(2)** The Kentucky Contact Center shall be governed by a board of directors ~~composed of representatives of member operators~~ who are elected by the membership. Board seats shall be composed of no more than twenty-one (21) voting members and six (6) nonvoting members and may be filled by representatives of the following:

- (a) A natural gas provider;
- (b) An electric provider;
- (c) A telecommunications provider;
- (d) A water/sewer provider;
- (e) An interstate pipeline operator;
- (f) A municipal utility operator; and
- (g) A commercial excavator;
- (h) An oil and gas operator;

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HB 303- Substantial Changes to Current Statute (Section 4)

(j) At least one (1) but not more than six (6) advisory, nonvoting members representing the following:

- 1. Public Service Commission;
- 2. Kentucky Transportation Cabinet;
- 3. Home Builders Association of Kentucky;
- 4. National Electrical Contractors Association;
- 5. Associated General Contractors of Kentucky; or
- 6. Kentucky Association of Master Contractors[An advisory, nonvoting representative of one (1) of the following:
  - 1. Home Builders Association of Kentucky;
  - 2. National Electrical Contractors Association;
  - 3. Associated General Contractors of Kentucky; or
  - 4. Kentucky Association of Plumbing, Heating-Cooling Contractors].

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HB 303- Substantial Changes to Current Statute (Section 4)

(3) Nonvoting members shall be elected by a majority of the voting members and shall serve for one (1) year terms which expire on December 31. Nonvoting members are eligible for reappointment by a majority of the voting members.

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HB 303- Substantial Changes to Current Statute (Section 5)

- (1) An excavator who fails to comply with any provision of KRS 367.4911, or an operator who fails to comply with any provision of KRS 367.4906, shall be guilty of endangering underground facilities and may be subject to a civil penalty[~~fine~~] of two hundred[~~and~~] fifty dollars (\$250) for the first violation[~~offense~~], no more than one thousand dollars (\$1,000) for the second violation[~~offense within one (1) year~~] and no more than three thousand dollars (\$3,000) for the third and any subsequent violation. A violation shall be considered a first violation under this subsection if more than three hundred sixty-five (365) days have elapsed since the last incident attributable to a person in violation of Section 2 or Section 3 of this Act. If a person commits a violation in the course and scope of employment, the penalties shall be imposed on the employer[~~offense~~].
- (2) A protection notification center that fails to comply with any provision of KRS 367.4913 shall be subject to a civil penalty[~~fine~~] of one thousand dollars (\$1,000) for each violation[~~offense~~].

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HB 303- Substantial Changes to Current Statute (Section 5)

- (3) A person that knowingly provides false notice to a utility notification center of an emergency as defined in KRS 367.4903 shall be subject to a civil penalty~~(fine)~~ of one thousand dollars (\$1,000) for each violation~~(offense)~~.
- (4) Any person who violates any provision of the Underground Facility Damage Prevention Act of 1994, KRS 367.4901 to 367.4917, that involves damage to a facility containing any flammable, toxic, corrosive, or hazardous material or results in the release of any flammable, toxic, corrosive, or hazardous material shall be subject to a civil penalty, in addition to the civil penalty in subsection (1) of this section,~~(fine)~~ not to exceed one thousand dollars (\$1,000) for each violation~~(offense)~~. The penalties of this subsection are not in conflict with and are in addition to civil damages for personal injury or property damage.

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HB 303- Substantial Changes to Current Statute (Section 5)

- (5) (a) Except as provided in subsection (6) of this section, all civil penalties~~(fines)~~ recovered for a violation of this section shall be paid to the general fund of the state, county, city, or fire protection agency which issued the citation.  
(b) In the event that more than one (1) government agency was involved, the court shall direct an apportionment of the civil penalties~~(fines)~~.  
(c) Failure to comply with the provisions of the Underground Facility Damage Prevention Act of 1994, KRS 367.4901 to 367.4917, may be determined at the conclusion of an investigation and shall be based on evidence available to state, county, or city officials, law enforcement, or fire protection agencies which issue the citation.
- (7) The commission shall make available on its Web site a written agreement form for an operator and an excavator to agree to a date or series of dates by which time the locate request must be completed if different from those dates established in Section 2 of this Act. The form shall contain but is not limited to the parties' names, the locate request number, the date requested, and the location. The parties shall make the executed agreement form available upon request of the commission.

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Senate Bill 172

- Addressed potential concerns from PHMSA
- Offers additional protections when underground facility damages occur as a result of exempt activities

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SB 172- Substantial Changes to Current Statute (Section 1)

- (9) (a) Each excavator who conducts or is responsible for any excavation or demolition that results in underground facility damage shall cease excavation or demolition activities and notify all affected operators of the location and nature of the underground facility damage immediately upon discovery of the damage.
- (b) Any individual or entity that is otherwise exempt from the requirements of KRS 367.4901 to 367.4917 under Section 2 of this Act, who conducts or is responsible for any excavation or demolition that results in underground facility damage to an underground facility or system used for producing, storing, conveying, transmitting, or distributing gas, petroleum, petroleum products, or hazardous liquids, shall cease excavation or demolition activities and notify all affected operators of the location and nature of the underground facility damage immediately upon discovery of the damage.

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SB 172- Substantial Changes to Current Statute (Section 1)

- (c) If the underground facility damage causes concern for public or workplace safety, the excavator, or the individual or entity that is otherwise exempt from the requirements of KRS 367.4901 to 367.4917 under Section 2 of this Act, shall notify appropriate public safety agencies of the location and nature of the safety concern.
- (d)(e) If the underground facility damage results in the escape or suspected escape of any flammable, toxic, or corrosive gas or liquid, the excavator, or the individual or entity that is otherwise exempt from the requirements of KRS 367.4901 to 367.4917 under Section 2 of this Act, shall cease excavation or demolition activities and immediately report to the appropriate authorities by calling the 911 emergency telephone number.

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SB 172- Substantial Changes to Current Statute (Section 2)

- Except as provided in subsection (9) of Section 1 of this Act, the requirements of KRS 367.4905 to 367.4917 shall not apply to the following:
  - (1) Excavation by an operator on its own easement except where that easement is crossed by another operator's facilities;
  - (2) Routine road maintenance or railroad maintenance or repairs;
  - (3) Tilling of soil for agricultural purposes;
  - (4) Excavators excavating on private property, using nonmechanized equipment, if there is no encroachment on any operator's right-of-way or easement;
  - (5) The opening of a grave in a cemetery;
  - (6) A solid waste disposal site which is properly permitted;
  - (7) Coal mining operations which are currently regulated under KRS Chapter 350;

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SB 172- Substantial Changes to Current Statute (Section 2)

- (8) A utility operator or utility operator subcontractor performing emergency work as defined in KRS 367.4903;
- (9) Leak migration testing using metal probes inserted by hand by an authorized representative of the operator; ~~or~~
- (10) Any nonintrusive excavating performed by an operator or his subcontractor to locate the operator's underground facilities in response to a notice of excavation from the notification center, if all reasonable precautions have been taken to protect the underground facilities; or
- (11) Nonintrusive excavating to inspect or perform maintenance for an existing utility pole.

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Questions?

Contact Information for  
Randall Kelley  
[r.kelley@krwa.org](mailto:r.kelley@krwa.org)  
Kentucky Rural Water Association  
270.843.2291

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KY 811 Contact Information

**Tim Vaughn**  
[tvaughn@usa811.org](mailto:tvaughn@usa811.org)  
**(502) 442-3160**

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**Kentucky 811**  
**2022 Damage Prevention Safety**  
**Summit**  
**June 28-30**  
**Lexington Marriott Griffin Gate**

✓ <http://www.kentucky.damagepreventionsummit.com/>

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# New Drinking Water Regulations and How They Will Impact Your Utility

Arianna Lageman  
March 8, 2022

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## DOW-DWB, Compliance Contacts

- Alicia Jacobs – Branch Manager, [Alicia.Jacobs@ky.gov](mailto:Alicia.Jacobs@ky.gov)
- Ethan Givan – Compliance Supervisor, [Ethan.Givan@ky.gov](mailto:Ethan.Givan@ky.gov)
- Julia Harrod – Chemicals, Secondary, RADs, Lead/Copper  
[Julia.Harrod@ky.gov](mailto:Julia.Harrod@ky.gov)
- Rodney Ripberger – RTCR, GWR, Inventory [Rodney.Ripberger@ky.gov](mailto:Rodney.Ripberger@ky.gov)
- Tekoyia (TK) Brown – MOR, Inventory, DBPs, LT2  
[Tekoyia.Brown@ky.gov](mailto:Tekoyia.Brown@ky.gov)
- Cortni Edwards – CCR/PN [Cortni.Edwards@ky.gov](mailto:Cortni.Edwards@ky.gov)

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## DOW-DWB, Technical Assistance

- Joe Uliasz – Frankfort Central Office, Supervisor
- Gabe Tanner – Frankfort and Louisville
- **Matt Lipps** – Florence and Morehead
- David Messer – London and Hazard
- CJ Bailey – Columbia and Bowling Green
- Jackie Logsdon – Madisonville and Paducah

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## Reminder from DOW

- Please use the Kentucky Online Gateway for ALL compliance document submittals.

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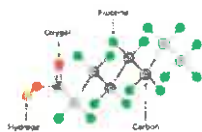
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## What are PFAS?

Perfluoroalkyl and Polyfluoroalkyl Substances



- Durable chemicals: oil, water, temperature, chemical and fire resistance
- Insulating properties

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## What are they used for?

- Wide variety of manufacturing applications
- Fire fighting foam (AFFF)
- Carpet protectant
- Non-stick cookware
- Waterproof clothing
- Surgical gowns
- Cell phones (any electronic device with a semi-conductor)
- Commercial aircraft
- Low-emission vehicles
- Some make up, sunscreen, shampoos, shaving creams
- Food packaging (like fast food wrappers)

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## UCMR5

- Any system > 3,300 population automatically must participate in UCMR5
  - Smaller systems may have to participate and EPA chooses who does based on population size and water source
  - EPA will still pay the tab for systems smaller than 10,000 (provided the federal funding is available)

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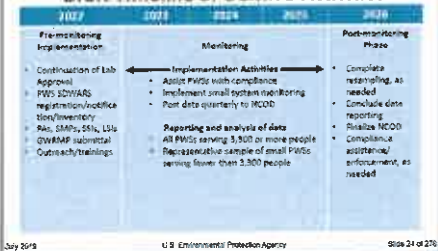
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### Draft Timeline of UCMR 5 Activities




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## Regulatory Action

PFAS Roadmap announced:

- Set MCLs for DW under SDWA
- Designate PFAS as “hazardous” under CERCLA (Superfund)
- More research to include PFAS emissions limits under Clean Air Act
- Simultaneously announced that PFAS will be labeled “hazardous” under RCRA as well.

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## Research

Division of Water Studies

- Evaluation of Kentucky Community Drinking Water for Per- & Poly-Fluoroalkyl Substances; November 18, 2019
- Evaluating Kentucky Source Waters for Per- and Poly-Fluoroalkyl Substances; August 4, 2021
- In progress: Study to test for PFAS levels in WW discharge and solids

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## Litigation

- NRWA filed a class action lawsuit against 3M, Tyco Fire Products, National Foam, Buckeye Fire Protection, Chemguard, DuPont, and Chemours
  - Suit alleges that these companies “manufactured, marketed and sold their aqueous film forming foam (AFFF) products for decades despite knowing the significant threat they posed to the environment and human health” – Napoli Shkolnik PLLC

<https://nrwa.org/issues/pfas/>

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### CCR Rule Revisions

- CCR regulations are being updated to “improve communication” with customers
- CWSs serving greater than 10,000 persons will be required to issue CCRs twice per year.
- A workgroup is making recommendations to the National Drinking Water Advisory Council

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### Cybersecurity

- The U.S. EPA has floated draft legislation to give EPA new regulatory authority for cybersecurity risk assessments, cybersecurity risk reduction plans, schedules of adoption countermeasures, reviews of the current risk and resilience assessments and emergency response plans, etc.

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### Lead and Copper Rule Revisions

- LCRR published and finalized December 17, 2021. The LCRR will go into effect to “support near-term development of actions to reduce lead in drinking water.”

**BUT**

- With the caveat that there would be a Lead and Copper Rule Improvements (LCRI) drafted and finalized prior to the LCRR compliance deadline of October 16, 2024.

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## LCRR and LCRI

- Line Inventory due by October 16, 2024:
  - Lead
  - Galvanized
  - Other
- LCRI aim to clarify:
  - Compliance Tap Sampling
  - Action vs Trigger Levels
  - Requirement to replace ALL lead service lines
  - Prioritization for Historically Underserved Communities

Kentucky Rural Water Association

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## LCRR and LCRI

- Biden-Harris Lead Pipe and Paint Action Plan
  - Remove all lead pipe in the next decade
  - Earmarks money for lead line, faucet, fixture replacement through the Build Back Better Act and American Rescue Plan Act
- KY's Total: \$112,643,00
  - DWSRF: \$29,587,000
  - LSL Rep: \$46,593,000
  - DW EC: \$12,425,000

Kentucky Rural Water Association

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[https://www.epa.gov/sites/default/files/2020-12/documents/reference\\_guide\\_for\\_pwss\\_12.21.20.pdf](https://www.epa.gov/sites/default/files/2020-12/documents/reference_guide_for_pwss_12.21.20.pdf)

CURRENT USE	Action Level (AL) and Trigger Level (TL)	NEW PROVISIONS
• 90% percentile (P90) level above lead AL of 15 µg/l or copper AL of 1.3 mg/l requires additional action	• 90% percentile (P90) level above lead AL of 15 µg/l or copper AL of 1.3 mg/l requires more action than the previous rule	• Defines lead trigger level (TL) of 10 - P90 < 15 µg/l that triggers additional planning, monitoring, and treatment requirements
<b>Lead and Copper</b>		
<b>Sample Site Selection</b>		
• Prioritizes collection of samples from sites with sources of lead in contact with drinking water		• Changes priorities for collection of samples with a greater focus on LSLs
• Highest priority given to sites served by copper pipes with lead solder installed after 1992 but before the state ban on lead pipes and or LSLs		• Prioritizes collecting samples from sites served by LSLs - all samples must be collected from sites served by LSLs if available
• Systems must collect 90% of samples from LSLs if available		• No distinction in prioritization of copper pipes with lead solder by installation date
		• Improved tap sample site selection listing criteria
<b>Collection Procedure</b>		
• Requires collection of the first-liver sample after water has sat stagnant for a minimum of 6 hours		• Requires collection of the first-liver sample in homes with LSLs after water has sat stagnant for a minimum of 6 hours and maintains first-liver sampling protocol in homes without LSLs
		• Adds requirement that samples must be collected in wide-mouth bottles

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COMPLIANCE	2014-2015
<ul style="list-style-type: none"> <li>Does not include separate testing and education program for CWSs at schools and child care facilities</li> <li>Schools and child care that are classified as NTN/CWSs must sample for lead and copper</li> </ul>	<ul style="list-style-type: none"> <li>System has not added any new water sources</li> <li>CWSs must conduct sampling at 20% of elementary schools and 20% of child care facilities per year and conduct sampling at secondary schools on request for 1 testing cycle (5 years) and conduct sampling on request of all schools and child care facilities thereafter</li> <li>Sample results and PE must be provided to each sampled school/child care, primary agency and local or state health department</li> <li>Excludes facilities built or replaced after January 1, 2014</li> </ul>
<p>Primary Agencies must report information to EPA that includes but is not limited to:</p> <ul style="list-style-type: none"> <li>All P90 levels for systems serving 3,300 people and only levels 15 µg/l for smaller systems</li> <li>Systems that are required to install LSI R and the date replacement must begin</li> <li>Systems for which optimal corrosion control treatment (OCCCT) has been designated</li> </ul>	<ul style="list-style-type: none"> <li>Expands criteria requirements to include</li> <li>All P90 values for all system sizes</li> <li>The current number of LSLs and lead status unknown service lines for every water system</li> <li>OCCCT status of all systems including primary agency-specified CWAJs</li> </ul>

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## Questions?

Arianna Lageman  
[a.lageman@krwa.org](mailto:a.lageman@krwa.org)

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**RECENT DEVELOPMENTS IN UTILITY REGULATION**

Presented to:  
Oldham County Water District

**Damon R. Talley**  
Stoll Keenon Ogden PLLC  
damon.talley@skofirm.com

March 8, 2022



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**DISCUSSION TOPICS**

1. PSC Filings
2. Minutes
3. 2021 General Assembly
4. Filed - Rate Doctrine 101
5. Open Meetings Act

Continued . . .

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**DISCUSSION TOPICS**

6. Notable PSC Orders
7. Borrowing Money
8. Surcharges
9. Recent PSC Orders
10. Cases to Watch

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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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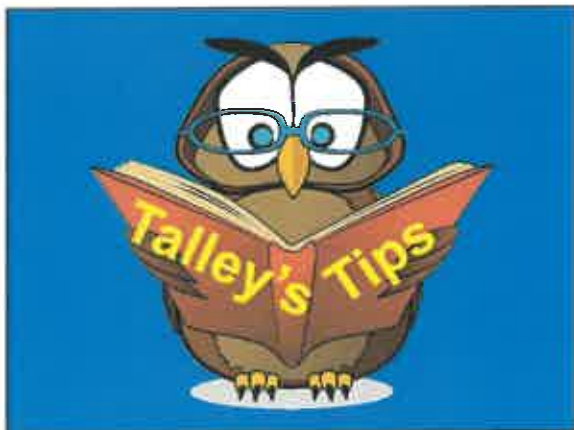
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## Default Regulatory E-mail Address

- Send E-mail to PSC
  - psc.reports@ky.gov
  - PSCED@ky.gov
- Send Letter to PSC
  - Linda C. Bridwell,  
Executive Director

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## No More Paper Copies

Case No: 2020-085 (COVID)  
Order: 07-22-2021  
Holding: Electronic Filings Only

- Utilities
- Lawyers
- Complainants
- Everyone

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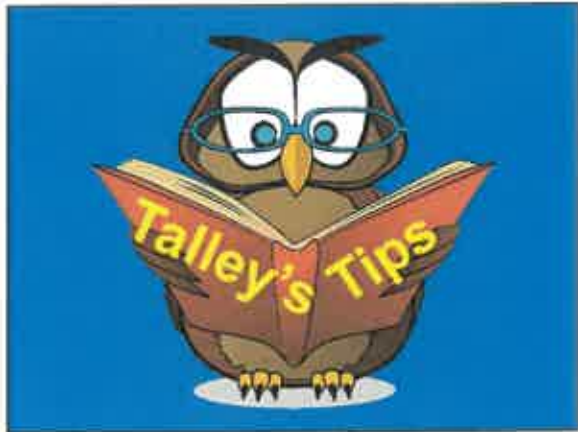
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### Electronic Filing

- Don't Procrastinate
  - Must Register to File
  - 2 Step Process (1 or 2 Days)
- Go Ahead and Register Now
- Call KRWA
- Call SKO Attorneys
- No Originals

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# MINUTES

An illustration of an open notebook with two blank white pages. The notebook has a dark cover and is shown from a slightly elevated perspective against a blue background.

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## What Are MINUTES?

- Official Record
- Much, Much More . . . .

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## Excerpt From Minutes

"Motion was made by Commissioner X and seconded by Commissioner Y to hire Commissioner Z to perform water line inspections on the Knob Hill Project at an hourly rate of \$20."

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AN OUNCE  
OF  
PREVENTION = A POUND  
OF CURE



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## Board Minutes

- A Board “speaks only through its minutes.”
- War Stories:
  - Ownership of water line and service of disputed territory
  - Careless Conversations

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## Preparation of Minutes

- Who prepares minutes?
  - Board Secretary or Staff
- Who edits minutes?
  - Staff or legal counsel
- Are meetings recorded on audio and/or video?
- Signing of Minutes
- Approval of Minutes

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### ADJOURNMENT

There being no further business to come before the meeting, motion was made by Commissioner Steven Douglas and seconded by Commissioner Henry Clay to adjourn the meeting. Motion carried unanimously.

Respectfully submitted,

BY: \_\_\_\_\_  
Henry Clay, Secretary  
ABRAHAM LINCOLN WATER  
DISTRICT

DATE APPROVED: \_\_\_\_\_

BY: \_\_\_\_\_  
Jefferson Davis, Chairman

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### Approval Of Minutes

I hereby certify that the foregoing Minutes were duly approved by the Board of Commissioners of the Abraham Lincoln Water District at a meeting held on the date shown below:

ABRAHAM LINCOLN WATER DISTRICT  
BY: \_\_\_\_\_  
JEFFERSON DAVIS, CHAIRMAN  
DATE APPROVED: \_\_\_\_\_

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### Board Minutes

A complete set of APPROVED Minutes SHALL be maintained at the utility office for inspection by the general public, regulators, customers, and the media.

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### Board Minutes

When are the Minutes considered in "final form" and available for public inspection?

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## Minutes

### What **MUST** Be Included?

- Board Member Attendance
- Official Actions

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## Minutes

### What **SHOULD** Be Included?

- Board Member Attendance
- Acknowledge Guests (Visitors)
- Official Actions
- Acknowledge Receipt of Reports
  - PSC Inspection Report

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## Minutes

### What **SHOULD** Be Included?

- Summarize **Some** Discussions
- Provide Context
- Toot Your Own Horn



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## Minutes

### Tooting Your Own Horn

- Give Yourself Credit
  - "Best Tasting Water"
  - Wooden Bucket Award
  - AWOP Award
  - Governor's Safety Award

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### How much information **SHOULD** be included in the MINUTES?



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## Minutes

### How **MUCH** is too **MUCH**?

- No definitive answer
- Art not a science

Cont.

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## Minutes ...

### How MUCH is too MUCH?

- Guidelines . . .
  - Minutes are **NOT** a transcript
  - Minutes are **NOT** the Congressional Record
  - Include rationale for action taken if it might avoid lawsuit

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“Conversations are  
NOT official actions of  
the Board.”

Virginia W. Gregg  
Former PSC Staff Attorney

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### WHY Include Summary of Conversations in Minutes?

- Document Board’s Due Diligence  
(e.g. Use of safety equipment; Training of Staff re confined space entry)
- Document Board’s Oversight Role (e.g. Cyber Security)
- Avoid or Win Litigation

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# TALLEY'S TIPS

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**Talley's Tips**  
**Prepare Minutes for a Reader ...**

1. Who did not attend the meeting.
2. Who will not read the Minutes until at least one year later.
3. Who is employed by PSC.
4. Who will access Minutes via www.

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# 2021 General Assembly

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### Notable Bills

- HB 272 – Late Payment Fees
- HB 312 – Open Records Act
- HB 393 – Commissioner Training

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### Notable Bills

- HB 570 – Interlocal Cooperation Act (2020)
- SB 465 – Acquisition of Water & Sewer Assets
- SB 36 – ARPA Funds \$250,000,000

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### Open Records Request Standardized Form

<https://ag.ky.gov>

#### Resources

Open Records / Open Meetings

Request Form

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## Open Records Request

- No Form or AG Form
- Written Request Submitted By:
  - Hand Delivered
  - Mailed
  - Fax
  - E-mail

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## Filed - Rate Doctrine 101

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## Filed – Rate Doctrine

- **Definition:** No utility shall charge a greater or less rate for any service than the rate contained in its filed schedules (Tariff).

KRS 278.160

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## Filed – Rate Doctrine

- Application - 2 Aspects
  1. If it is in your Tariff, you **must** charge it.
  2. If it is **not** in your Tariff, you can **not** charge it.

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## Filed – Rate Doctrine

Requires Filing of:

- Rates
- Rules & Conditions of Service
- **Contracts**

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### Filed – Rate Doctrine

- File Wholesale Contracts with PSC
  - War Stories (2)
    - Length of Contract
    - Buy All Water
- Check PSC Website When You Return

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## Open Meetings Act

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### Attending Board Meeting Via Zoom

- KRS 61.826 Amended: 2018
- Now Easier to Conduct Meeting via Video Teleconference (VTC)
  - All Meetings
  - Board Member Attend Remotely
    - Count in Quorum Call
    - Fully Participate
    - More Than One

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## Special Rules - VTC

- Identify Primary Location
- Everyone Must Be Able to **See** and **Hear** Everyone Else
- Notice Requirements
  - Meeting Will Be VTC
  - Primary Location

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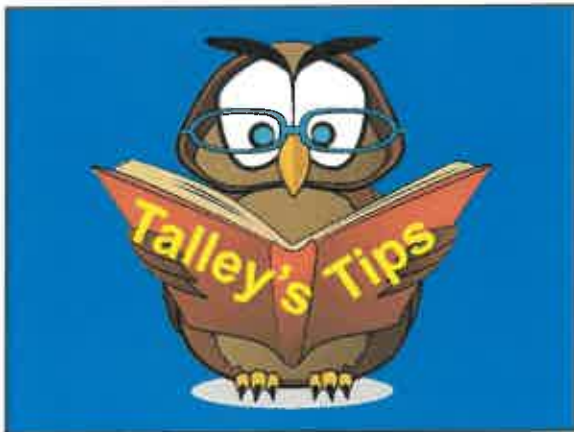
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## Notice of VTC Meetings

1. Regular Meetings
  - Adopt Schedule (61.820)
  - Some or All of the Regular Meetings Will Be VTC
  - Primary Location at \_\_\_\_\_
  - Public May Attend at Primary Location

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## Notice of VTC Meetings

- 2. Special Meeting
  - Normal Rules (61.823) Plus
    - May Be VTC Meeting
    - Primary Location at \_\_\_\_\_
    - Public May Attend at Primary Location
- 3. Minutes
  - Comm. \_\_\_\_\_ Attended via VTC

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## Notable PSC Orders

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## PSC Case No. 2020 - 028

Filed: 2-24-2020  
Utility: Bluegrass Water Utility  
Operating Co.  
Issue: Is PSC Approval Needed to  
Acquire 4 sewer "Utilities"?  
Decided: 6-19-20

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## Bluegrass Water

Holding: Yes  
PSC Approval Required  
Rationale: 24 - Page Order

- 8 Pages Devoted to This Issue
- Implied Authority
- Plenary Power

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## Southgate 1954

In *Public Service Commission v. Cities of Southgate and Highland Heights*, 268 S.W.2d 19 (Ky. 1954), this Court concluded that the PSC's power included not only powers expressly provided by statute but could also encompass powers **necessarily implied** to take action to meet its statutory duties. Specifically, in that case this Court concluded that the PSC had the **implied power** to approve or disapprove a utility systems sale, despite the lack of express statutory authority to do so, because of the PSC's general statutory authority under KRS 278.040 to regulate utility service.

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## Bluegrass Water

### O/R Precedents:

- Ky. American – Owenton  
PSC Case 2005-206  
Order Dated 7-22-05
- Many Others

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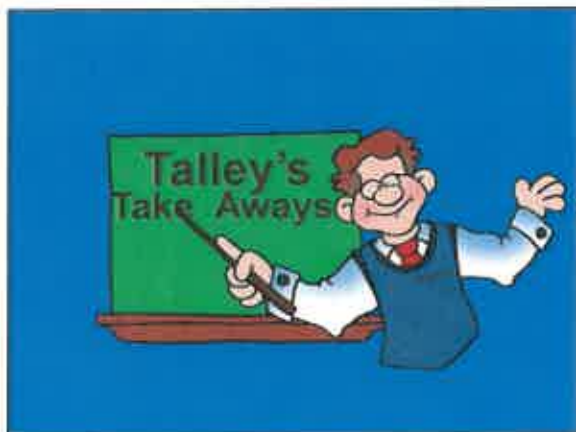
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## PSC Case No. 2021 - 222

Filed: 6-9-2021  
Utility: Southeastern Water Assoc.  
Type: CPCN - AMI  
Issue: Reasonable Alternatives Considered  
Decided: 8-12-21

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## PSC Case No. 2021-222

- CPN: Standard of Review
  - Need
  - Absence of Wasteful Duplication

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## PSC Case No. 2021-222

- Need:
  - Substantial Inadequacy of Existing Facilities
    - Substantial Deficiency or
    - Inability to Render Adequate Service

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## PSC Case No. 2021-222

- Absence of Wasteful Duplication:
  - Excess Capacity Over Need
  - Excess Investment
  - Unnecessary Multiplicity of Physical Properties

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## PSC Case No. 2021-222

- Proving Lack of Wasteful Duplication:
  - All Reasonable Alternatives Considered
  - Cost is Not Sole Criteria
    - Initial Cost
    - Annual Operating Cost

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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 # 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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## 2018 Show Cause Cases

- WD # 1
  - All Commissioners Resigned
  - General Manager Resigned
  - PSC Dismissed Case

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## 2018 Show Cause Cases

- WD # 2
  - Commissioners Settled with PSC
  - \$500 Fine (suspended)
  - 12 Hours Training Per Year
  - WD Not Fined
  - See Timeline

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## Timeline

09-27-17	Staff Report
01-11-18	Show Cause Order
02-27-18	Hearing (Rescheduled)
04-08-19	Offer of Settlement
06-19-19	Order Accepting Offer of Settlement

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**W.D. Surcharges**

Cannonsburg	2014-267 & 2018-376
Martin Co.	2018-017
Estill Co.	2019-119
Graves Co.	2019-347
Farmdale	2020-021
Southern	2019-131

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**Water Loss Reduction Surcharge**

- Mechanism to Recover Reduction in Revenue Requirement Because of Unaccounted for Water Loss over 15%
- Time Limit: 36 or 48 Months
- Monetary Limit
- Restrictions

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**Restrictions**

- Separate Bank Account
- Water Loss Reduction Plan
- Prior PSC Approval
- Monthly Reports

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## How to Get Surcharge

1. File ARF Case
  - Staff Report
  - Motion for Surcharge
2. File Separate Application

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**QUESTIONS?**

STILL  
REOPEN  
ORDER

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**Recent  
PSC  
Orders**

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## Thou Shall File a Rate Adjustment Case

- Over 3 Dozen Utilities
- Case Type
  - PWA
  - Refinancing
  - . 023 cont.

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## Rate Adjustment

- Case Type
  - Defending Wholesale Rate Increase
  - Intervention
  - Deviation
  - Any Application

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## Rate Adjustment

- Reasons
  - No Recent General Base Rate Adjustment
  - Negative Cash Flow
  - Decreasing Depreciation Reserves

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**PSC Case No. 2019 - 041**

Filed: 03-12-2019  
Utility: 11 Water Utilities  
Type: Investigation  
Issue: Excessive Water Loss  
Hearings: 11 Separate Hearings  
Decided: 11-22-19

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## Leaky 11 Cases

### Findings:

- High Water Loss is Symptom of Larger Problems
- Poor Board Oversight
- Poor Management
- Poor Financial Health
- Need Rate Increase

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## Leaky 11 Cases

### Utilities Ordered to:

- Develop Water Loss Reduction Plan
- Perform Water Loss Audit
- Adopt Policies
- Adopt Procedures
- Board Training

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## Leaky 11 Cases

### PSC Published

### Comprehensive Report:

- November 22, 2019
- 82 Pages
- Summarized Findings
- Legislative Recommendations

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## PSC Case No. 2019 - 080

Filed: 02-21-2019  
Seller: Pikeville  
Buyer: Mountain WD  
Type: Municipal Wholesale  
Rate increase  
Hearing: 09-11-2019  
Decided: 12-19-19 & 01-31-20

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## Pikeville

### Issues:

- COSS: M1 vs. M54 Manual
- Discovery
- Rate Case Expense

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## Pikeville

### Holding:

- COSS: Invalid
- Wholesale Rate Increase ↓
- Rate Case Expense
  - No COSS Expert \$
  - Attorney Fees OK

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### Pikeville Holding (cont.)

- Other Wholesale Customer
  - Settled Before Case Filed
  - PSC Reduced Rate
  - Must Pay 1/2 of Rate Case Expense

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### Pikeville Status

Decided: 12-19-19 & 01-31-20  
Appealed: Franklin Cir. Court  
Status: Pending

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### PSC Case No. 2019 - 444

Filed: 11-27-2019  
Seller: Princeton  
Buyers: Caldwell Co. WD &  
Lyon Co. WD  
Type: Municipal Wholesale  
Rate increase  
Hearing: 05-05-2020  
Decided: 06-15-2020

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## Princeton

### Issues:

- Unit Cost Approach
- No True COSS
- Allocation of Expenses
- Rate Case Expense

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## Princeton

### Holding:

- Unit Cost Approach: Invalid
- Wholesale Rate Increase ↓
- Rate Case Expense
  - Reduced
  - Attorney Fees OK

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## Princeton Holding (cont.)

- Rate Case Expense Shared by Princeton & Wholesale Customers
- Criticized for No Negotiations
- Both Wholesale Customers Must File Rate Adjustment Application

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### **PSC Case No. 2019 - 268**

Filed: 07-31-2019  
Seller: Knott Co. WD  
Type: ARF Case  
Hearing: 01-22-2020  
Decided: 01-31-20

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### **PSC Case No. 2019 - 268**

- Utility Requested 48% ↑
- Staff Recommended 70% ↑
- PSC Granted Increase:
  - Year One 46%
  - Year Two 15%
- Hearing Noteworthy

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### **PSC Case No. 2020 - 137**

Filed: 6-8-2020  
Utility: West Daviess Co.  
Type: Deviation  
Issue: 15 Year Meters  
Sample Testing  
Decided: 12-02-20

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**PSC Case No. 2020 - 138**

Filed: 6-8-2020  
Utility: Southeast Daviess Co.  
Type: Deviation  
Issue: 15 Year Meters  
Sample Testing  
Decided: 12-02-20

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**PSC Case No. 2021 - 071**

Filed: 2-4-2021  
Utility: Hyden - Leslie Co. WD  
Type: Tariff Review  
Issue: Imputed Liability  
Decided: Pending

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## TEN TIPS FOR EFFECTIVELY DEALING WITH THE PUBLIC SERVICE COMMISSION

PRESENTATION TO  
WATER COMMISSIONER TRAINING/OLDHM  
COUNTY WATER DISTRICT

MARCH 8, 2022  
Gerald Wuetcher  
Stoll Keenon Ogden PLLC  
gerald.wuetcher@skofirm.com  
<https://twitter.com/gwuetcher>  
(859) 231-3017

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## INTRODUCTION

- Current regulatory environment
  - Criticism of H<sub>2</sub>O utility management
  - Threats to penalize/remove H<sub>2</sub>O Officials
  - Ratemaking decisions adverse to H<sub>2</sub>O utility interest
  - Greater emphasis on formal proceedings

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## INTRODUCTION

- PSC organizational changes
  - Significant Staff turnover
  - Smaller, less experienced Staff
  - Significant increase in case workload
  - Fewer available PSC resources
  - Newly appointed commissioners
  - Pandemic conditions limiting opportunities to meet with PSC and discuss issues informally

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**WHAT ACTIONS CAN A WATER UTILITY TAKE TO DEAL EFFECTIVELY WITH PSC?**

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**TIP NO. 1**

**ENSURE THAT THE PSC CAN COMMUNICATE WITH YOUR UTILITY**

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**TIP NO. 2**

**STAY CURRENT WITH THE TECHNOLOGIES NECESSARY TO FUNCTION BEFORE THE PSC**

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### TIP NO. 3

**IDENTIFY ALL REQUIRED FILINGS  
AND TIMELY MAKE THOSE FILINGS**

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### TIP NO. 4

**BECOME FAMILIAR WITH PSC LAWS  
AND REGULATIONS**

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### TIP NO. 5

**STAY CURRENT WITH PSC  
DECISIONS AND ANNOUNCEMENTS**

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### **TIP NO. 6**

**PREPARATION IS ESSENTIAL TO OBTAINING YOUR REQUESTED RELIEF FROM THE PSC**

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### **TIP NO. 7**

**DON'T ASSUME THE PSC IS INFORMED ON AN SUBJECT. EXPLAIN AND EDUCATE.**

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### **TIP NO. 8**

**YOUR LAWYER AND ENGINEER ARE ESSENTIAL PLAYERS ON YOUR TEAM. USE THEM.**

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**TIP NO. 9**

**HAVE A STRATEGY FOR THE CASE BEFORE FILING THE APPLICATION**

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**TIP NO. 10**

**THOROUGHLY DOCUMENT YOUR UTILITY'S ACTIONS**

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**TIP NO. 11**

**THE PSC IS NOT YOUR FRIEND – IT'S YOUR REGULATOR. TREAT IT ACCORDINGLY.**

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STOLL  
KEENON  
OGDEN

Questions?

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STOLL  
KEENON  
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