



EVERYTHING YOU WANTED TO KNOW ABOUT CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY AND DEBT AUTHORIZATIONS*

*** BUT WERE AFRAID TO ASK THE PSC**

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ORDER OF PRESENTATION

- Who Must Obtain A CPCN?
- What Projects Require A CPCN?
- Preparing the Application for CPCN
- Approaches For Obtaining CPCN
- What Debt Instruments Require PSC Authorization?



WHO MUST OBTAIN A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY?



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



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



WHO IS **NOT** A UTILITY?

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



WHAT PROJECTS REQUIRE A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY?



KRS 278.020(1)

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.



WHAT REQUIRES 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???**



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**



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)



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



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**



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
- Issuance of Debt is **NOT A FACTOR**
- Each Project is considered individually unless related



EXTENSIONS IN THE ORDINARY COURSE: MATERIALLY AFFECT

- Projects Financed With Others' Funds
 - Not Material if Customer finances total amt
 - Deemed Not to Affect Utility's Financial condition
- Government Grants equivalent of customer financing? No material effect? **(Unclear)?**
- Implications for projects funded by ARRA

CERTIFICATE OF PUBLIC CONVENIENCE & NECESSITY CONTINUUM

CERTIFICATE NOT REQUIRED

- Percentage of Net Plant
- Presence/Lack of Rate Impact
- Debt Issued to Finance Project
- Other Factors

10% Rule

Project is 2.1% of net plant (12-269)

Project is 3.2% of net plant (99-310)

Project is 1.5% of net plant (92-028)

Project is 5.0% of net plant (07-424)

Project is 1.0% of net plant (07-058)

Project is 0.4% of net plant (14-171)

Project is 92% of net plant – no rate increase (16-065)

Project is 55% of net plant – revenues offset expenses (14-368)

45%

30%

15%

5%

1%

CERTIFICATE REQUIRED

Project is 14.7% of net plant (09-010)

Project is 4.7% of net plant – outside financing (07-014)

Project is 0.8% of net plant (15-108)

Project is .65% of net plant – possible rate increase (13-365)

Project is 42.4% of net plant (371 S.W.2d 20)

Project is 13.24% of net plant (04-292)

Project is 5.56% of net plant (10-244)

Project is 0.75% of net plant (16-181) – possible wasteful duplication

Project is 16.4% of net plant (09-010)

Project is 16.3% of net plant (15-089)

Projects are 0.11% - 1.37% of net plant – Utility must request declaratory ruling (02-352) (02-474) (05-164) (06-033) (07-509) (14-292) (15-284)



“WATER DISTRICT EXCEPTION

- KRS 278.020(1) amended in 2019
- 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
- Expires at end of Biennium Unless Reauthorized
- Applies to “**water line extension or improvement project**”



“WATER DISTRICT EXCEPTION”

- 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)



“WATER DISTRICT EXCEPTION”

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



METHOD OF ANALYSIS

- Water District Exception 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



WHEN IN DOUBT

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



CONSTRUCTING WITHOUT CERTIFICATE: CONSEQUENCES

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



PREPARING THE APPLICATION FOR A CERTIFICATE



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



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



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)



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



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



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



SUGGESTED APPROACHES TO OBTAINING PSC APPROVAL



EXPEDITING PSC REVIEW

- 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



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



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



DEBT AUTHORIZATION



KRS 278.300

“No utility shall issue any securities or evidences of indebtedness, or assume any obligation or liability in respect to the securities or evidences of indebtedness of any other person **until it has been authorized so to do by order of the commission.**”



WHAT IS AN EVIDENCE OF INDEBTEDNESS?

- Bonds
- Notes
- KIA Assistance Agreement
- Lease to Purchase Agreement
- Installment Contracts



EXCEPTIONS TO REQUIREMENT

- Notes that are not payable for periods of more than two years
- Limit: Note may not be renewed for an aggregate period to exceed six year



MUST SHOW THAT ISSUANCE

- Is for lawful object/purpose
- Is necessary & appropriate for the utility's performance of its service to public
- Will not impair its ability to perform service to public
- Is reasonably and appropriate to perform service to public



CONSEQUENCE OF NON-COMPLIANCE

- Assessment of \$2,500 Penalty To:
 - Utility
 - Utility Management
 - Board Members
 - Legal Counsel
- Questions re: legality of debt



QUESTIONS?

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