

**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. 2022-00338</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: tedge@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 November 9, 2022 at NKWD's offices in Erlanger, Kentucky. The program is entitled "Northern Kentucky Water Training 2022." 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; federal and state laws regarding sexual harassment in the workplace and how these laws affect water and wastewater utilities; the results of a survey conducted by the Kentucky Water Resources Research Institute assessing Kentucky's water utility workforce; a review of general litigation that water and wastewater utilities frequently face and strategies that can prevent such litigation or result in a successful defense; 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 previously provided at the accredited training program conducted at NKWD's offices for the past four years.<sup>1</sup> The Joint Applicants will provide each attendee with a copy of each speaker's presentation. In addition, presenters may provide attendees with copies of applicable laws, regulations, Kentucky court decisions, and Public Service Commission orders. The Joint Applicants will include a copy of these materials with their sworn statement and report regarding the instruction. Should any presenter revise or amend his or her presentation prior to the presentation or provide additional written materials to the attendees, a copy of the revised presentation will also be submitted.

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 December 15, 2022, 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.

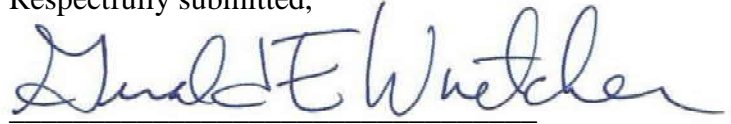
16. The Joint Applicants will include with the sworn statement documentary evidence of the program's certification for continuing education credit by certifying authorities and a copy of any written material provided to the attendees that is not included in this Application.

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 2022” for six hours of water district management training.

Dated: October 7, 2022

Respectfully submitted,



Gerald E. Wuetcher  
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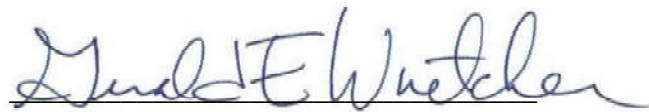
*Counsel for Stoll Keenon Ogden PLLC*

Tom Edge (KBA #95534)  
General Counsel  
Manager of Legal, Compliance, and Regulatory  
Affairs  
Northern Kentucky Water District  
2835 Crescent Springs Rd.  
P.O. Box 18640  
Erlanger, KY 41018  
tedge@nkywater.org  
Phone - 859-578-5457  
Fax - 859-426-2770

*Counsel for Northern Kentucky Water District*

CERTIFICATE OF SERVICE

In accordance with 807 KAR 5:001, Section 8, and the Public Service Commission’s Order of July 22, 2021 in Case No. 2020-00085, I certify that this document was transmitted to the Public Service Commission on October 7, 2022 and that there are currently no parties that the Public Service Commission has excused from participation by electronic means in this proceeding.



Gerald E. Wuetcher

# **EXHIBIT 1**

**Northern Kentucky Water Training**  
**Presented by**  
**Northern Kentucky Water District & Stoll Keenon Ogden PLLC**  
**November 9, 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    **Sexual Harassment and Respectful Workplace – Elizabeth S. Muyskens**  
Board members have a duty to adopt, periodically review, and oversee the enforcement of its policies. One such policy that is coming under close scrutiny is the duty of a utility to maintain a safe, respectful workplace that is free from unlawful discrimination, harassment, or retaliation for all employees. This presentation discusses the role of the Board and the role of Management in developing and implementing these best practices to foster a workplace environment that is the envy of other utilities.
- 9:35 – 9:45    **Break**
- 9:45 – 10:45    **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 Sales Tax laws concerning “Residential” exemptions, borrowing money, compliance with PSC Orders, keeping Minutes, and laws enacted by the 2022 General Assembly. The presenter will also examine and discuss recent court and PSC decisions.
- 10:45 – 10:55    **Break**
- 10:55 – 11:55    **Litigation Involving Water Utilities – Todd Osterloh**  
Just like any other type of business, water utilities frequently face litigation. Waterline breaks, contracts, property disputes, employment actions, and termination of service can all give rise to an aggrieved party filing a complaint in Court. This session is designed to inform water-utility managers about various types of litigation involving government-owned water utilities and ideas that can lead to prevention or a successful defense.
- 11:55 – 12:30    **Lunch (Provided on site)**

## **Afternoon Agenda**

**12:30 – 1:30 Kentucky Water Workforce Survey Results – Donna McNeil and Valerie Lucas**

As the water utility industry workforce continues to age, there is a national concern about the problem of recruiting and retaining workers. The UK Kentucky Water Resources Research Institute conducted two online surveys to assess Kentucky's water utility workforce. One survey collected feedback directly from operators while the second survey asked managers and decision makers to provide feedback from the perspective of the utility. The surveys were designed to identify the challenges and barriers that utilities face in recruiting and retaining drinking water and clean water operators. The presentation will summarize the results of each survey.

**1:30 – 1:40 Break**

**1:40 – 2:40 Everything You Wanted to Know About Certificates of Public Convenience and Necessity and Debt Authorizations But Were Afraid to Ask – 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 Public Service Commission has historically used to determine whether a proposed project requires a certificate of public convenience and necessity and exceptions to those requirements. The forms of project financing that require PSC approval and the evidence that must be presented to obtain such approval also be reviewed.

**2:40 – 2:45 Break**

**2:45 – 3:45 Legal Issues in the Operation & Management of Water Systems – Panel Discussion - Panelists: Damon Talley, Gerald Wuetcher**

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**

## **VALERIE LUCAS**

Valerie Lucas is the Executive Director of Clean Water Professionals of Kentucky and Tennessee (CWP-KT). Prior to serving as CWP-KT Executive Director, Valerie spent over a decade in the water sector as a consulting engineer. She is a licensed professional engineer in the state of Kentucky and holds a Bachelor and Master of Science in Civil Engineering from the University of Kentucky.

## **DONNA MCNEIL**

Donna McNeil is a Research Engineer with the UK Kentucky Water Resources Research Institute (KWRRI). Prior to joining KWRRI, Donna was the Executive Director of the Kentucky Infrastructure Authority, during which she served on two Legislative Task Forces focused on Public Water and Wastewater Infrastructure and the Private Wastewater Systems. Her experience includes working as a compliance specialist with the Kentucky Rural Water Association and managing the Kentucky drinking water program at the Kentucky Division of Water. Donna has over 30 years of service helping drinking water and wastewater utilities staff, decision-makers, and consultants. Donna received a Bachelor of Science Degree in Civil Engineering from the University of Kentucky and has an Engineer-In-Training Certification in Kentucky.



## Elizabeth S. Muyskens

Elizabeth is a Member in Stoll Keenon Ogden's Lexington office and has been with the firm since 2008. She is part of the Labor, Employment & Employee Benefits practice and represents employers in Kentucky and surrounding states. She counsels clients on workplace law issues, represents employers in administrative proceedings and is prepared to litigate matters when conflicts arise. Elizabeth also serves on the board of directors for the firm.

For her many legal accomplishments, Elizabeth has been honored as a "Rising Star" by Kentucky Super Lawyers® and named a "Leading Lawyer for Business" in her field by Chambers USA. Given her strong reputation and substantial expertise in employment law, Elizabeth is a frequent speaker at professional seminars.

Prior to joining SKO, while pursuing her undergraduate degree, Elizabeth worked for the U.S. Attorney's Office for the Eastern District of Kentucky.

**Labor, Employment & Employee Benefits:** Elizabeth coordinates with in-house counsel, human resources professionals and company leaders on employment agreements, internal investigations, personnel issues and a range of other concerns. She also represents employers in administrative proceedings and effectively argues cases in Court.

### Work Highlights

#### Dismissal of Complaints

SKO sought dismissal of two complaints against a theological seminary, arguing that the First Amendment to the U.S. Constitution prevents the Court from considering the matter. More specifically, SKO argued that because of the Free Exercise and Establishment Clauses, courts do not have jurisdiction over claims arising from the employment relationship between a religious institution and its ministerial employees. The Court granted summary judgment for the Seminary, and the Kentucky Court of Appeals confirmed each judgment.

#### Breach of Employee Covenant

SKO filed suit on behalf of a relocation and executive housing provider to enforce the covenants in an employment agreement and to recover damages. A competitor hired a former employee of our client and conspired with the employee to steal business from our client by misappropriating trade secrets and improperly utilizing confidential information.

### Elizabeth S. Muyskens

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elizabeth.muyskens@skofirm.com

### BAR & COURT ADMISSIONS

U.S. Court Of Appeals, Sixth Circuit  
U.S. District Court, Eastern District Of Kentucky  
U.S. District Court, Western District Of Kentucky  
Kentucky  
U.S. Court Of Appeals, Seventh Circuit  
United States Supreme Court

### EDUCATION

University of Kentucky College of Law  
2008, J.D., summa cum laude  
University of Kentucky  
2005, B.S., summa cum laude

### RECOGNITION

Kentucky Rising Stars® Honoree,  
2015-2022  
*Chambers USA*, Leading Lawyer for  
Business, Labor & Employment, 2015-  
2016  
Top Ranking Student in the Class  
Order of the Coif



## **M. TODD OSTERLOH**

Member

tosterloh@sturgillturner.com

### **EDUCATION**

University of Kentucky, J.D. (2004)  
Kentucky Law Journal, Editor-in-  
Chief  
Western Kentucky University, B.A. (2001)

### **SERVICE AREAS**

Government & Municipal Law  
Utilities & Energy

### **AFFILIATIONS**

Kentucky Rural Water Association  
Kentucky Municipal Utilities Association  
Kentucky Bar Association  
American Bar Association  
Federal Bar Association  
Fayette County Bar Association

### **COMMUNITY OUTREACH**

Leadership Frankfort, Class of 2012

### **ACCOLADES**

Best Lawyers in America® Utilities Law  
Lexington Lawyer of the Year (2021)  
Best Lawyers in America® Utilities Law

Todd's primary practice areas involve utility regulation and municipal defense. As a former Staff Attorney for the Kentucky Public Service Commission, Todd is well-equipped to represent utilities and intervenors in any case before the regulatory agency. He represents the second largest investor owned water utility in the Commonwealth, and has represented a number of municipal utilities before the Commission. Working closely with Jim Gardner, Todd has also represented solar developers, transmission companies, and other companies in the energy sector.

Todd has also represented more than two dozen municipalities in a wide variety of matters. He has represented Cities on cases ranging from a small 4-inch sanitary sewer service line to a massive 120-inch stormwater sewer line. Todd's municipal work extends beyond utilities. He also advises public agencies on eminent domain as well planning and zoning matters. He also frequently represents Cities and their law enforcement officers on cases alleging false arrest, malicious prosecution, abuse of force, wrongful death and wrongful conviction.

In addition to advising clients in utility and municipal law, Todd expanded his practice when he and his wife expanded their family. Since adopting a son several years ago, Todd has helped over a dozen families finalize the adoption of a child. Although adoptions are not a significant percentage of his practice, they are the most rewarding part of his practice.

### **EXPERIENCE**

Represents an industry group on regulatory issues impacting commercial utility customers.

Represented public utilities and municipalities in rate cases before the Public Service Commission.

Successfully defended a public utility in a "show cause" investigation established by the Public Service Commission.

Assisted a water district in obtaining approval for Kentucky

Infrastructure Authority financing and a certificate of public convenience and necessity from the PSC.

Advised a water district on refund of sewer charges ordered by the Public Service Commission.

Represented a public utility and its corporate parents in an administrative case in which the entities received approval of a transfer of control.

Defended several municipalities in litigation involving sanitary sewer backups onto private property.

Advised a regional sanitation district on the legal duty of certain private property owners to pay storm water fees.

Obtained summary judgment on behalf of a municipality and its police officer on claims of false arrest and malicious prosecution in federal court.

Successfully briefed arguments related to municipal contracts on behalf of a municipality, its mayor, and city council members, for which the Kentucky Court of Appeals upheld dismissal of the plaintiff's complaint.

Secured a verdict in favor of his client in a forcible detainer bench trial in Fayette District Court.

Represented parents in adoption finalizations in Fayette, Franklin, Anderson, Jessamine and Scott Circuit Courts.

Law clerk to U.S. Magistrate Judge Tu Pham in Memphis, TN  
Supreme Court of the Republic of Palau, Court Counsel

## **SEMINARS**

Problems with Public Records Requests, CLE presentation for the National Business Institute "Advanced Legal Issues Affecting Local Government and Municipalities: The Ultimate Guide" (November 2018)

Open Meetings and Public Hearing Law Changes, CLE presentation for the National Business Institute "Advanced Legal Issues Affecting Local Government and Municipalities: The Ultimate Guide" (November 2018)

Panel Discussion of Open Records/Open Meetings, CLE presentation for the Municipal Attorneys Association of Kentucky (MAAK) (May 2018)

Open Meetings Laws & Public Records Issues, CLE presentation for the National Business Institute "Ensuring Local Governments Comply with the Law" Seminar (2017, 2015, 2013)

Advanced Legal Issues Affecting Local Governments and Municipalities: An Ultimate Guide, National Business Institute CLE (December 2016)

Utility Rate Setting, presentation at the Kentucky League of Cities Annual Conference (October 2012)

Contracts between Cities and Public Utilities, CLE presentation for the Municipal Attorneys Association of Kentucky (MAAK) (October 2011)

Numerous CLE presentations on the Open Records and Meetings Acts at the Water Personnel Training Seminars hosted by the Public Service Commission.



Damon R. Talley

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## BAR & COURT ADMISSIONS

Kentucky  
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.

## RECOGNITION

Best Lawyers®, Lawyer of the Year (Lexington),  
Utilities Law, 2023  
Best Lawyers®, Utilities Law, 2021-present  
Sullivan Medallion, presented to Outstanding  
Graduating Student, University of Kentucky  
Moot Court Board, President, University of  
Kentucky College of Law  
Outstanding Student, University of Kentucky  
College of Engineering  
Omicron Delta Kappa, President, University of  
Kentucky  
Kentucky Association of Future Farmers of  
America, President  
Outstanding Citizen Award, LaRue County  
Chamber of Commerce, 1990  
Outstanding Citizen Award, Cave City Chamber of  
Commerce, 1981  
Outstanding Citizen Award, Horse Cave  
Chambers of Commerce, 1979

## Damon R. Talley

Damon joined Stoll Keenon Ogden's Utility & Energy practice as Of Counsel in 2015 and serves clients through the firm's Hodgenville, Lexington and Louisville offices.

Before his time at SKO, Damon worked for decades in private practice and has provided legal representation to public utilities throughout Kentucky. He has focused primarily on water utilities, and his deep expertise in drinking water has earned him a reputation statewide as a go-to legal resource in this area. Damon is general counsel of the Kentucky Rural Water Association and has served in this capacity since 1979.

Given his substantial experience, Damon is frequently called upon to speak at training sessions sponsored by the Kentucky Rural Water Association, Division of Water, Utility Management Institute and other utility groups in the state.

Damon is highly active in the local community and serves as a board member of several nonprofit organizations. He is a past board member of the Kentucky Infrastructure Authority. He was a charter member, long-time board member and two-term board chairman of the Kentucky FFA Foundation.

**Utility & Energy:** Damon represents public utility clients before federal and state courts at the trial and appellate levels. He handles matters such as rate adjustments, transfers of control, financing and construction applications, and consumer complaint proceedings.

## Work Highlights

Damon serves as General Counsel of the Kentucky Rural Water Association and has served in this capacity since 1979.

Damon serves as General Counsel of the Kentucky Rural Water Finance Corporation and has served in this capacity since 1995.



## Gerald E. Wuetcher

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gerald.wuetcher@skofirm.com

### BAR & COURT ADMISSIONS

Kentucky

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.

### RECOGNITION

Best Lawyers®, Utilities Law, 2021-present

## Gerald E. Wuetcher

Jerry is Counsel to the Firm in Stoll Keenon Ogden's Lexington office and is part of the Utility & Energy practice. He joined the firm in 2014, after working for more than 26 years at the Kentucky Public Service Commission (PSC) as a staff attorney, deputy general counsel and executive advisor.

Over the course of his career, Jerry has frequently appeared before the PSC in administrative proceedings involving electric, natural gas, water and sewer utility issues and has represented the PSC in state and federal courts. He also served as the PSC's representative in several interagency groups addressing water and wastewater issues. He drafted amendments to various provisions of Kentucky's public utility statutes and revisions to the PSC's administrative regulations.

From 2009-2013, Jerry was PSC's representative on the board of the Kentucky Infrastructure Authority. He developed and implemented the PSC's training program for water utility officials and was an instructor for that program.

Jerry is a frequent speaker on utility and local government issues before such organizations as the Kentucky Rural Water Association, Kentucky League of Cities, Kentucky Association of Counties and Utility Management Institute.

Along with his significant experience in the realm of civilian law, Jerry served for 27 years in the U.S. Army as a judge advocate before retiring at the rank of colonel in 2011. He occupied numerous roles on active duty and in a reserve status.

**Utility & Energy:** Jerry concentrates on public utility law in Kentucky, but also participates in general and commercial litigation, transactions, employment concerns, securities issues and mergers and acquisitions involving gas, electric and water companies. He handles all facets of regulatory matters, including the negotiation of complex agreements and representation before state agencies and courts.

### Work Highlights

Attorney, Kentucky Public Service Commission (1987-2014). Served as a staff attorney, deputy general counsel and executive advisor. 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. Responsible for drafting and revising the Commission's regulations. Served as the Commission's representative in various interagency groups addressing water and wastewater issues. Served as the Commission's representative on the Kentucky Infrastructure Authority's Board of Directors (2009-2014). Developed the Public Service Commission's water training program for water utility officials.

Judge Advocate, U.S. Army (1984 – 2011). Served as a judge advocate in the U.S. Army on active and reserve status in numerous roles. Retired at the rank of Colonel.

Adjunct Professor of Law, University of Louisville (2011)



# **EXHIBIT 3**

**Sexual Harassment and Respectful Workplace Training**

Elizabeth S. Muyskens  
elizabeth.muyskens@skofirm.com  
Stoll Keenon Ogden PLLC  
November 9, 2022

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**Agenda**

1. Unlawful Workplace Behavior
2. No Retaliation
3. Best Practices for Creating a Respectful Workplace

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**Duty to Provide Respectful Workplace**

- Organizations of all sizes and in all industries have a duty to provide a safe, respectful workplace free from unlawful discrimination, harassment, or retaliation for all employees.
- A respectful workplace can be achieved by adopting and enforcing policies outlining these expectations.

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## Unlawful Discrimination

- Unlawful discrimination occurs when an employee is treated less favorably because of his or her protected class(es).
- Persons may be members of multiple protected classes.

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## Employment Protection Laws

- ❖ **Title VII of the Civil Rights Act of 1964**
  - Prohibits discrimination because of race, color, national origin, religion, or sex.
- ❖ **Pregnancy Discrimination Act (PDA)**
  - Requires employers to treat pregnancy just like any other medical condition with regard to benefits and leave policies

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## Employment Protection Laws

- ❖ **Americans with Disabilities Act (ADA)**
  - Prohibits discrimination in terms or conditions of employment against individuals with disabilities who, with or without reasonable accommodation, can perform the essential functions of the job.
- ❖ **Age Discrimination in Employment Act (ADEA)**
  - Prohibits age discrimination in employment for employees age 40 and over.
- ❖ **Family and Medical Leave Act (FMLA)**
  - Provides eligible employees with up to 12 weeks of job protected leave annually for certain family and medical reasons.

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## Unlawful Discrimination

### Reminders

- Do not allow members of one protected class to be treated different from members of another.
- Do not permit comments based on a person's protected class.
- Do not permit comments that might be offensive to a protected class.

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## Report Unlawful Discrimination

- Employees should be required to report all instances of unlawful discrimination.
- Anti-retaliation laws protect persons who make good faith complaints of discrimination, as well as persons who participate in an internal investigation of a discrimination complaint. All entities should have a non-retaliation policy.

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## What is Sexual Harassment?

- Form of sex discrimination that violates Title VII of the Civil Rights Act and the Kentucky Civil Rights Act.
- The victim, as well as the harasser, may be a man or a woman.
- The victim and the harasser do not have to be of the opposite sex.

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**What is Sexual Harassment?**

- Unwelcome sexual advances,
- Requests for sexual favors, or
- Other verbal or physical conduct of a sexual nature.

And, the conduct must:

- Explicitly or implicitly affect a term or condition of an individual's employment;
- Unreasonably interfere with an individual's work; or
- Create an intimidating, hostile or offensive work environment.

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**Unwelcome Sexual Advances and Conduct**

As a general rule, conduct is "unwelcomed" if the employee did not solicit or incite it, and the employee regarded the conduct as undesirable or offensive.

It can be difficult to distinguish between conduct that is:

- invited,
- uninvited but welcome,
- offensive but tolerated, and
- flatly rejected.

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**Does this Constitute an Unwelcome Sexual Advance or Conduct?**

- Would the conduct take place if a spouse were present?
- Does the conduct exclude, ridicule or belittle a person because of his or her gender?
- Has the victim expressed his or her distaste for the conduct?
- Does the conduct involve intentional physical conduct of a suggestive/sexual nature?

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**Is It a Hostile Environment?**

- Frequency of the conduct
- Severity of the conduct
- Whether it is physically threatening or humiliating
- Whether the conduct is “merely offensive”
- Whether the conduct unreasonably interferes with an employee’s work performance
- Whether the conduct was directed at the complaining party

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**Is It a Hostile Environment?**

Often requires careful consideration of social context in which behavior occurs and/or circumstances surrounding behavior.

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**Is It Quid Pro Quo Sexual Harassment?**

- Quid Pro Quo is Latin for “this for that”
- Generally it involves a person in power pressuring a subordinate employee for sexual favors in exchange for advancement in the workplace or under the threat of adverse employment action.
- May be specific or implied threat or promise regarding the victim’s job

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### What do I do?



Ensure your organization has adopted equal employment opportunity, anti-discrimination, anti-harassment, and anti-retaliation policies. More importantly, review whether those policies are being enforced consistently.

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### Guiding Principles of the Harassment-Free Workplace

- Think before you speak.
- Respect the workplace. (If you wouldn't do or say it in front of a loved one, you probably shouldn't do or say it at work.)
- Keep your hands to yourself.
- Speak up if you have a complaint.

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### If you see something, say something.

This is the message we want to send employees. Both your policies and practices should strongly encourage or require employees to report issues to management.




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### Retaliation



Federal and state law prohibit any type of retaliation against any person for making a good faith, legitimate complaint of sexual harassment or for participating in the investigation of a complaint.

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

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- E. All of the above

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### Benefits of a Respectful Workplace

- Respect Contributes to Job Satisfaction
- Respect Increases Employee Engagement
- Respect Creates a Fair Environment
- Respect Improves Knowledge Sharing
- Respect Improves the Bottom Line

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### Respectful Workplace

75% of people are **hired** for their **technical skills**.

75% of people are **let go** because of their **people skills**.

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### Demographics Exercise

- First, we are going give you a description of an individual.
- Next, we will give you 10 seconds to write down as many demographics about the individual as you can based on your mental picture of them. Try to list their age, race, sex, religion, and anything else your mental picture includes.

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### Individual One

Individual One's parents divorced when they were a child. Individual One dropped out of college to do administrative work in a law firm. They also worked as a waitress, house painter, bartender, comedian, and went on to win the Presidential Medal of Freedom. Individual One got married at fifty years old. Individual One is dedicated to animal rights and is a vegetarian.

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### Individual One is ...



Ellen DeGeneres

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### Individual Two

Individual Two's father worked for the US Department of Labor and their mother worked for the Illinois Attorney General. Individual Two is a Christian musician. Individual Two has volunteered on various political campaigns at the state and national level. Individual Two recently made a one million dollar donation to a local school system.

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 **Individual Two is ...**



**Chance the Rapper**

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 **Individual Three**

Individual Three was born in Israel to a homemaker and a Doctor. Individual Three attended Harvard University and spoke to its 2015 graduating class. Individual Three is part-owner of a professional sports team. Individual Three has two published research papers and speaks six languages.

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 **Individual Three is ...**



**Natalie Portman**

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### Scenario

A father and son were involved in a car accident in which the father was killed and the son was seriously injured. The father was pronounced dead at the scene of the accident and his body was taken to a local morgue. The son was taken by ambulance to a nearby hospital and was immediately wheeled into an emergency operating room. A surgeon was called. Upon arrival and seeing the patient, the attending surgeon exclaimed "Oh my God, it's my son!"

**Explain what happened.**

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### Scenario

A father and son were involved in a car accident in which the father was killed and the son was seriously injured. The father was pronounced dead at the scene of the accident and his body was taken to a local morgue. The son was taken by ambulance to a nearby hospital and was immediately wheeled into an emergency operating room. A surgeon was called. Upon arrival and seeing the patient, the attending surgeon exclaimed "Oh my God, it's my son!"

**Explain what happened.**

**ANSWER: The doctor is the child's mother.**

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### Unconscious / Implicit Bias

- Implicit bias occurs because, over time, our brains create associations between things. This forms actual pathways in our brain, which are unconsciously strengthened every time the association is confirmed.
- Implicit biases come from media, family, friends, school, experiences, work, and more.
- The exercise we just did demonstrated some of our own implicit biases.

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### How to Address Implicit Bias in the Workplace?

- Recognize we all have biases.
- Stop & think. Don't always trust your first impression.
- Be curious about people's differences.
- Don't try to suppress your biases.
- Don't be too hard on yourself.
- Keep processes simple.
- Schedule demanding work separate from "people decisions".
- Make sure you keep yourself well rested and well fueled.
- Challenge negative stereotypes and assumptions.

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### Implicit Bias in the Workplace

- It is important that employees are aware of their own implicit biases and recognize when they impact our actions.
- We want all employees to treat everyone in the workplace, including co-workers and customers, with respect.
- Encourage employees to listen to the people around them.

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### Disrespectful and Offensive Behaviors

- Examples:
  - Consistently getting someone's name wrong
  - Passive aggressive comments
  - "You are acting like a girl"
  - Failing to acknowledge someone's presence

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**Keep Certain Discussions Out of the Workplace**

- There is no constitutional right to free speech in a private workplace.
- Certain speech may violate anti-harassment and discrimination laws
- Certain speech may violate company policies
- Certain speech may violate best practices and exhibit poor judgment

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**End Result**

- If employees Respect others and
- take Responsibility for their behavior
- then they will be more Relaxed at work
- and Rest at night.

**R & R**

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**QUESTIONS?**

**Elizabeth S. Muyskens**  
 (859) 231-3626  
 elizabeth.muyskens@skofirm.com  
 Stoll Keenon Ogden PLLC  
 November 9, 2022

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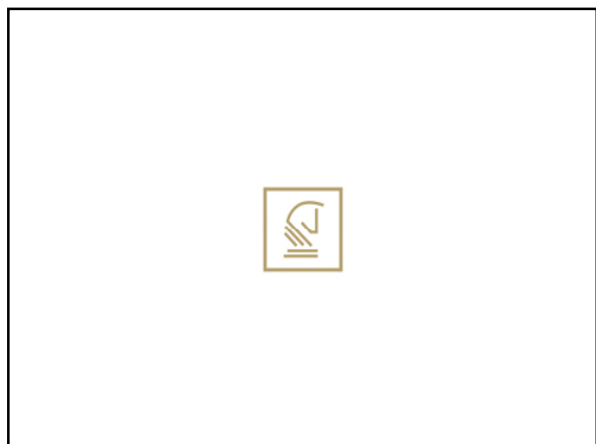
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# HOT LEGAL TOPICS

November 9, 2022

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

SPONSORED BY



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## DISCUSSION TOPICS

1. PSC Filings
2. Comply with PSC Orders
3. Minutes
4. 2022 General Assembly
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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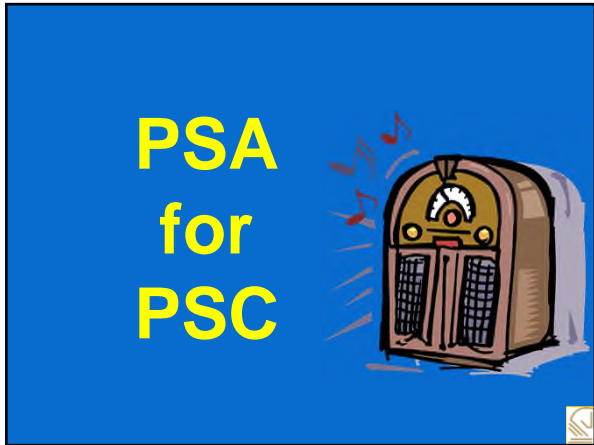
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### Reporting Requirements

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

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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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## 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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**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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**Comply  
With All  
PSC  
Orders**



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**PSC Case No. 2021 - 343**

Filed: 12-14-2021  
Type: Failure to Comply with PSC Order  
Issue: Did Not Timely File Rate Application & Failure to File PSC Annual Report  
Decided: 07-15-2022



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**PSC Case No. 2021 - 343**

(cont.)

Result: WD Fined \$5,000

- WD Pay \$250
- Board Members & GM Attend 12 Hours of PSC Training
- Balance of Fine Suspended for 12 Months
- No More Violations



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**PSC Case No. 2022 - 215**

Filed: 07-18-2022  
Type: Failure to Comply with PSC Order  
Issue: Did Not Timely File Rate Application  
Decided: Pending



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## PSC Case No. 2022 - 215

(cont.)

### Facts:

- Must File Rate Case by 03-10-2021
- Got Extension Until 05-31-2022
- Nothing Filed by 07-18-2022
- PSC Opened Case



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“... for allegedly failing to comply with the Commission’s March 10, 2020 Order in Case No. 2019-00458. The willful failure to comply presents prima facie evidence of incompetency, neglect of duty, gross immorality, or nonfeasance, misfeasance, or malfeasance in office sufficient to make [the District’s] officers and manager subject to the penalties of KRS 278.990 or removal pursuant to KRS 74.025. The Commission finds that a public hearing should be held on the merits of the allegations set forth in this Order.”



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## PSC Case No. 2022 - 215

(cont.)

### Manager’s Defense:

- I Told Board
- I Called PSC and  
Got Another Extension



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## PSC Case No. 2022 - 215

(cont.)

### Board's Defense:

- Manager Told US
- Knew We Got an Extension
- Thought Manager Was Taking Care of It
- Manager Assured Us That He Got Second Extension



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## PSC Case No. 2022 - 215

(cont.)

### Status:

- Discovery Stage
  - Multiple Rounds
  - Pandora's Box Opened
    - Commissioners' Appointments
    - Prove Fiscal Court Has Approved Your Salary
    - ? ? ?



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## PSC Case No. 2022 - 228

Date: 08-22-2022  
Type: Failure to Comply with PSC Order  
Issue: Did Not Timely File Rate Application  
Decided: Pending



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## PSC Case No. 2022 - 228

(cont.)

### Facts:

- PWA Case 2 Penny ↑
- Must File Rate Case by 04-15-2022 (6 Months)
- Nothing Filed by 08-22-2022
- PSC Opened Case



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## PSC Case No. 2022 - 228

(cont.)

### Manager's Defense:

- Honesty
- I Never Read the Order
- I Never Told the Board
- Fell on His Sword †



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## PSC Case No. 2022 - 228

(cont.)

### Board's Defense:

- Ignorance is Bliss
- Manager Never Told Us
- Manager's Job to Tell Us
- Acknowledged Ultimate Responsibility



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## PSC Case No. 2022 - 228

(cont.)

### Affirmative Steps to Mitigate:

- Adopt New Procedure
  - All PSC Orders Forwarded to Board Members
- Engaged Services of RCAP to File Rate Case



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## PSC Case No. 2022 - 228

(cont.)

### Status:

- Discovery Will Soon Begin
- District is Getting CJE to Re-appoint Commissioners



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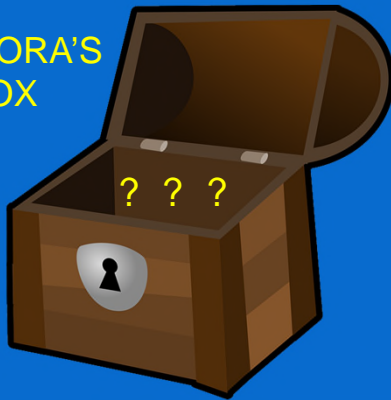
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PANDORA'S  
BOX



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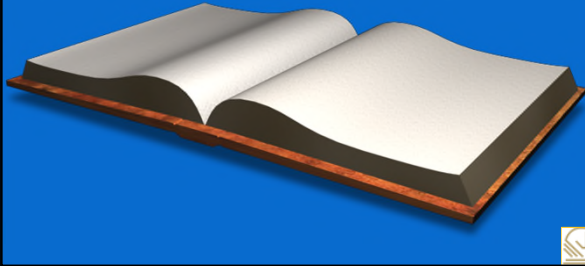
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# MINUTES



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## What Are MINUTES?

- Official Record
- Much, Much More . . .

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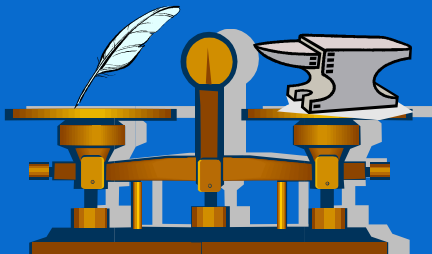
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AN OUNCE  
OF  
PREVENTION = A POUND  
OF CURE



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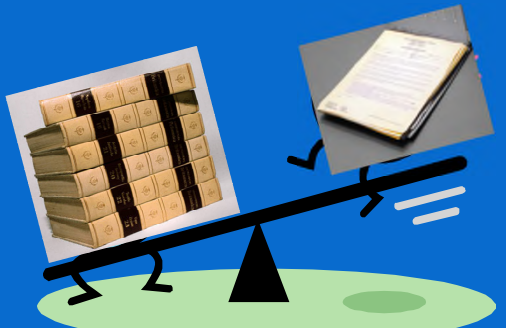
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## How much information **SHOULD** be included in the MINUTES?



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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. Water Loss)
- Document Board's Oversight Role (e.g. Compliance with PSC Orders)
- 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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# 2022 General Assembly

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- ### Notable Bills
- HB 1 – ARPA Funds  
\$250,000,000
  - HB 8 – Residential Sales  
Tax Exemption  
for Utility Customers  
Modified

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- ### Notable Bills (cont.)
- HB 758 – “Martin County Bill”
    - \$10,000,000 for Water &  
Wastewater Assistance Fund
    - Troubled Utilities
    - Water Associations Now Eligible  
to Obtain Funds from KIA
      - Borrow
      - Grant
      - ARPA

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**Notable Bills  
2021 General Assembly**

- HB 312 – Open Records Act
- HB 393 – Commissioner Training



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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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# 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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**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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**PSC Case No. 2022 - 065**

Filed: 3-29-2022

Utility: Southeastern Water Assoc.

Type: CPCN – New Office Bldg.

Issue: Reasonable Alternatives Considered

Decided: 8-30-22

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**PSC Case No. 2022-065**

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

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### **PSC Case No. 2022-065**

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



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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**

- CPCN: 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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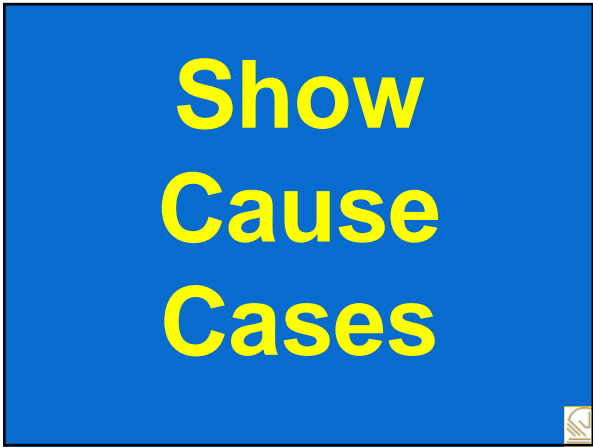
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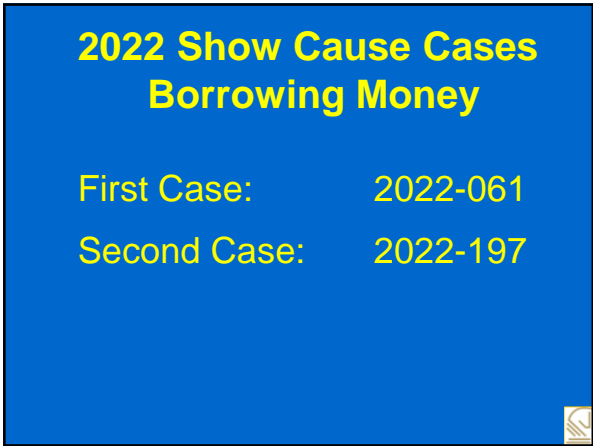
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**2022 Case # 1**

Case No. 2022 - 061  
Opened: 04 - 08 - 2022  
Issue: KRS 278.300  
(2 Violations)  
Repeat Offender - 2013  
Decided: Pending



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**2022 Case # 1**

Facts: (1) Refinanced RD Loans  
w/o PSC Approval  
07-23-2021  
Facts: (2) Bought Truck  
w/o PSC Approval  
➤ Bank Loan  
➤ 75 Months  
Discovered: PSC Staff – Rate Case



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**2022 Case # 1**

Corrective Action:  
▪ Filed Application for Retroactive  
Approval (Case No. 2021-465)  
➤ PSC Denied  
➤ No Retroactive Approval



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**2022 Case # 1**

Defenses:

- Ignorance
- Lawyer Said No PSC Approval Needed
- Relied on Bank
- New Manager



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**2022 Case # 1**

Case Status:

- Switched Lawyers
- Discovery Stage
  - 2 Rounds Thus Far
- Hearing Date: ???



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**2022 Case # 2**


Case No. 2022 - 197

Opened: 08- 11 - 2022

Issues: Violated:

- KRS 278.300
- KRS 278.020

Decided: Pending



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**2022 Case # 2**

Background Facts:

- 11-18-21: Purchased Office Bldg.
- 11-18-21: Financed Portion of Cost with a 7 year Loan
- 03-15-22: Applied for Retroactive Approval of Loan

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**2022 Case # 2**

Background Facts (continued):

- 05-13-22: PSC Issues DR
- 05-??-22: Bank Loan PIF
- 05-27-22: PSC Application Withdrawn by Utility

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**2022 Case # 2**

Background Facts (continued):

- 06-20-22: PSC Dismisses Case & States Intent to File Show Cause Case
- 08-11-22: PSC Opens Show Cause Case



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**2022 Case # 2**

Utility's Defenses:

- Loan Paid Off
- No CPCN Needed Since Building was Purchased & Not Constructed
- Relied Upon Advice of Counsel
- Good, Honest & Decent People



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**2022 Case # 2**

Case Status:

- Discovery Stage
  - 1<sup>st</sup> DR Issued 09-07-22
- Hearing Date: ? ? ?



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**Surcharge Cases**



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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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## Recent PSC Orders



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## Thou Shall File a Rate Adjustment Case

- Over 75 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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**PSC Case No. 2021 - 422**

Filed: 11-22-2021


Utility: Southern Madison Utilities

Type: Investigation by PSC

Issue: Fiber Optic in Water Lines

Hearing: 08-24-2022

Decided: Pending



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**QUESTIONS?**

damon.talley@skofirm.com

270-358-3187

STOLL  
KEENON  
OGDEN

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**TODD OSTERLOH**



**STURGILL  
TURNER**  
STURGILL, TURNER, BARKER & MOLONEY, PLLC

333 West Vine Street, Suite 1500  
Lexington, Kentucky 40507  
(859) 255-8581 - [www.sturgillturner.com](http://www.sturgillturner.com)

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**COMMON WATER  
UTILITY LAWSUITS**

*Methods of Prevention,  
and  
Tips to Defend Them*

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**Common Utility Litigation**

- Negligence
- Breach of Contract
- Employment Matters
- Open Records and Open Meetings
- Wrongful Termination of Service
- Invasion of Service Territory

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**Common Public Entity Defenses**

- Governmental Immunity
- Claims Against Local Government Act
- Qualified Official Immunity

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**DEFENSES**

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**An ounce of prevention is worth a pound of cure!**

Negligence	Proactive versus Reactive
Contract (and tariff)	Review & comply (revise if necessary)
Employment	Proper policies and supervision

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# GOVERNMENTAL IMMUNITY

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## Governmental Immunity

A state or county agency is protected from tort liability if it performs a governmental, as opposed to a proprietary, function.

Yanero v. Davis, 65 S.W.3d 510 (Ky., 2001)

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S. Woodford Water Dist. v. Byrd,  
352 S.W.3d 340, 343 (Ky. Ct. App. 2011)



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**S. Woodford Water Dist. v. Byrd,**

- Property owner requests disconnection of rental property
- On April 1, 2008, owner found the property flooded
- Sometime in February or March, pipes froze and burst
- Owner files lawsuit, alleging negligence by the WD for failing to disconnect the water at his property

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**Governmental Immunity  
To whom does it apply?**

Who created the entity?  
State? County? City? Other?

Do the functions of the entity focus on  
state level government concerns  
common to all citizens?

Comair, Inc. v. Lexington-Fayette Urban Cnty. Airport Corp.,  
295 S.W.3d 91, 94 (Ky.2009)

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**Governmental Immunity**

Does governmental immunity apply to  
water districts?

**Yes, in 2011**

S. Woodford Water Dist. v. Byrd,  
352 S.W.3d 340, 343 (Ky. Ct. App. 2011)

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**Governmental Immunity**

Parentage?

KRS 74.010 - a fiscal court in accordance with KRS 65.810.

KRS 65.810 - Persons shall present a petition signed by 20% of average voters; fiscal court shall approve or disapprove of the formation of the district.

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**Governmental Immunity**

State level concerns?

“water districts provide clean water for personal consumption, recreation, and agricultural and commercial use, thereby providing for the health, safety, and welfare of Kentucky citizens.” - S. Woodford Water Dist.

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**Governmental Immunity**

Does governmental immunity apply to sanitation districts?

**No**

Coppage Construction Company, Inc. v. Sanitation District No. 1, 459 S.W.3d 855 (2015)

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**Governmental Immunity**

Parentage?

KRS 220.040 – a county board of health must approve a petition submitted by landowners or governing municipal bodies.

“no county can impose a sanitation district upon its citizens under KRS Chapter 220 (or its predecessor), and none of the counties involved in this litigation ‘created’ SD1” – Coppage Construction

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**Governmental Immunity**

SD1 Parentage?

- Special taxing district
- Derive their revenues from the imposition of fees on customers
- Governed by a board separate from county
- Judge/Executives can review and approve budgets
- Issue bonds with authority and procedures granted to incorporated municipalities
- County Judge/Executes appoint SD Board Members
- Liability risks public treasury (Coppage concurrence)

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**Governmental Immunity**

State level concerns?

**Apparently not**

- Coppage Construction relied on older case law
- “to carry out a limited public purpose in a local area”
- “services similar to a private corporation” *Calvert v. MSD* (1991)
- Everyone has a role in protecting water quality, not just SDs or MSDs.

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### Governmental Immunity

Sanitation Districts are a part of the regulatory scheme designed to protect the state's water supply in furtherance of the policy of conservation and protection. See [KRS 224.70-100](#).

#### Coppage Construction disagrees

Clean Water Act was enacted after the enabling act for SDs and there is no cross-reference in the statutes.

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### Governmental Immunity

#### Coppage Construction

"SD1 simply does not perform an integral state function. Sewage disposal and storm water management systems are not a traditional and necessary state function such as those functions performed by the state police, our public schools, the corrections system, and public highways and airways."

Instead, the sewage disposal and storm water drainage services SD1 offers are designed to meet the needs of a discrete, localized geographic region.

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### Governmental Immunity

Are Water Districts eligible for governmental immunity following Coppage Construction?

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### Governmental Immunity

A state or county agency is protected from tort liability if it performs a governmental, as opposed to a proprietary, function.

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### Governmental or Proprietary?

S. Woodford Water Dist. v. Byrd, 352 S.W.3d 340, 344 (Ky. Ct. App. 2011)(governmental)

Keathley v. Town of Martin, 246 S.W.2d 152, 155 (Ky. 1951) (proprietary)

Elec. Plant Bd. of City of Mayfield v. City of Mayfield, 299 Ky. 375, 380, 185 S.W.2d 411, 413 (1945) (proprietary)

Baird v. City of Adairville, 426 S.W.2d 124, 125 (Ky. 1968)(natural gas system is proprietary)

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### Claims Against Local Government Act

A local government shall not be liable for injuries or losses resulting from:

Any claim arising from the exercise of judicial, quasi-judicial, legislative or quasi-legislative authority or others, exercise of judgment or discretion vested in the local government.

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**Claims Against Local Government Act**

- (a) The adoption or failure to adopt any ordinance, resolution, order, regulation, or rule;
- (b) The failure to enforce any law;
- (c) The issuance, denial, suspension, revocation of, or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authorization;
- (d) The exercise of discretion when in the face of competing demands, the local government determines whether and how to utilize or apply existing resources; or
- (e) Failure to make an inspection.

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**Claims Against Local Government Act**

Nothing contained in this subsection shall be construed to exempt a local government from liability for negligence arising out of acts or omissions of its employees in carrying out their ministerial duties.

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**Claims Against Local Government Act**

Discretionary Acts  
vs.  
Ministerial Acts

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**Claims Against Local Government Act**

**Discretionary Acts**

personal deliberation, decisions and judgment

protects governmental employees from liability for good faith judgment calls in a legally uncertain environment

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**Claims Against Local Government Act**

**Ministerial Acts**

The duty is absolute, certain, and imperative, involving mere execution of a specific act based on fixed and designated facts.

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**Siding Sales, Inc. v. Warren Cnty. Water Dist., 984 S.W.2d 490, 491 (Ky. Ct. App. 1998)**

- Arson destroys commercial building
- City approves building permit for new building, conditioned on WD providing fire protection flow
- City and WD split cost to increase water line size
- Building owner sued, arguing that water pressure was insufficient to protect building

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### **Siding Sales, Inc.**

Building owners argue:

- o That City failed to enforce fire protection standards
- o That City issued permit knowing that lot did not comply with fire protection safety standards
- o That CALGA does not apply because these are ministerial duties.

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### **Siding Sales, Inc.**

The Court of Appeals held:

- The allegations are really that the City failed to prevent the injury by providing insufficient water.
- The City's (and WD's) role was merely regulatory in nature, related to establishing and enforcing fire protection standards.
- This type of governmental action is subject to CALGA.

The Court also noted that a City may not be held to the same standard as a private corporation.

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### **Claims Against Local Government Act**

**Discretionary Acts  
vs.  
Ministerial Acts**

Courts have generally determined that a utility's decision to construct or open service is a discretionary act, but it has a ministerial duty to non-negligently construct, maintain, and repair its system.

Mason v. City of Mt. Sterling,  
122 S.W.3d 500, 504 (Ky. 2003)

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### Claims Against Local Government Act

Russell v. City of Owensboro, No. 2012-CA-002006-MR, 2014 WL 1407238, at \*1 (Ky. App. Apr. 11, 2014).

- A woman tripped due to a two-inch break in a sidewalk
- Lawsuit vs. City of Owensboro, arguing negligent sidewalk repair plan
- City's official policy required prioritization of repairs because of the limited financial resources

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### Russell v. City of Owensboro

The Court of Appeals:

- Cities have a traditional duty to maintain sidewalks
- But then the General Assembly passed CALGA
- In Sliding Sales, CALGA applied because the WD had discretion on how to spend its limited resources.
- City does not have enough money to repair every sidewalk every year.
- Policy prioritizes repairs and allocates limited resources.

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### Russell v. City of Owensboro

The Court of Appeals:

- CALGA applies because
  - Exercise of discretion when in the face of competing demands, the local government determines whether and how to utilize or apply existing resources
  - Failure to make an inspection

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**Claims Against Local Government Act**

Making it work for Water Districts & Cities

1. Have a policy in place.
2. Focus on elements of CALGA.
3. Use the Owensboro case as an outline.
4. Do not accept the plaintiff's characterization of the claims.

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**Qualified Official Immunity**

Protects all public officials and employees from lawsuits except those who are “plainly incompetent” and/or those “who knowingly violate the law.”

Rowan Cnty. v. Sloas, 201 S.W.3d.469, 475 (Ky, 2006)

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**Qualified Official Immunity**

Applies when:

Actor's conduct is a

- 1) Discretionary act
- 2) That was made in good faith (not in bad faith)
- 3) And within the scope of the employee's authority

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**Other Litigation Advantages**

**Expert Witnesses**

The Plaintiff shall be required to present expert testimony to support its position that the Defendants failed to meet the proper standard of care in the wastewater industry in clearing the obstruction in the sewer line.

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**Common Utility Litigation**

1. Negligence
2. Breach of Contract
3. Employment Matters
4. Open Records Meetings
5. Wrongful Termination of Service
6. Invasion of Service Territory

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**Negligence**

Duty

Breach of that Duty

Injury

Causation between the breach and the injury

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Failure to Terminate Water Service

Operational Tips

Document Request      Document Service Call

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Wrongful Disconnection of Water Service

Operational Tips

Document reasons for disconnection      Document customer notification

Document service call

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Negligently Turning on the Water Service

Operational Tips

Have the field operator check to see if the meter is turning immediately after turning on service

Coordinate with the property owner as to the timing of service initiation.

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**Water Line Break**

**Operational Tips**

- Immediately notify your insurance company if you think there may be a property damage
- Photographs or video
- Have a policy in place to help with CALGA defense
- If prolonged litigation, demand expert from the plaintiff

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**Sewer Line Backup**

**Operational Tips**

- Document service call and location of blockage
- If employees communicate with property owner, get detailed facts (e.g. location of inflow, etc.)
- Have a policy in place to help with CALGA defense
- In litigation, ask about why the homeowner may share responsibility. New basement bathroom? No check valve?
- These cases are hard for the utility to win at trial because of the “yuck” factor.

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**Failure to Notify Customers of Repair**

**Operational Tips**

- Notify your customers in non-emergency situations
- Consider Social Media

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## Leaving Meter Pit Unlocked or Open

Most states hold that there is no duty to lock a meter or meter vault.

Maryland Cas. Co. v. City of Jackson, 493 So.2d 955 (Miss. 1986) (“the City is still not held to be an insurer of the safety of motorists on its streets or customers of its water services”)

City of Bryan v. Jenkins, 247 S.W.2d 925 (Tex. App. 1952)

Smith v. Alabama Water Service Co., 225 Ala. 510 (1932)

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## Construction Negligence

Hyden-Leslie Water Dist. v. Jessie Hoskins, No. 2010-CA-000599-MR, 2011 WL 919818, at \*1 (Ky. Ct. App. Mar. 18, 2011)

- Plaintiff was injured when a bridge collapsed
- He claimed that a bridge cable was damaged when a water line was being installed a few months prior
- Lawsuit against the WD and the construction company
  - The Water District may not have raised governmental immunity

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# BREACH OF CONTRACT

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### Breach of Contract

“Such a district, therefore, is a political subdivision and in the execution of contracts with third parties must observe the same formalities required of counties and municipalities. . . . This Court has repeatedly held that one contracting with a political subdivision does so at his peril, unless the contract is executed in the manner provided by statute.”

Louisville Extension Water Dist. v. Diehl Pump & Supply Co., 246 S.W.2d 585 (Ky. 1952)

Louisville Extension Water Dist. v. Sloss, 503, 236 S.W.2d 265 (1951)

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## EMPLOYMENT DISPUTES

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### Americans with Disabilities Act

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**ADA**

ADA prohibits discrimination

“qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”

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**ADA**

“disability”

- A physical or mental impairment that substantially limits one or more major life activity (MLA) of an individual; or
- A record of such an impairment; or
- Being regarded as having such an impairment

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**ADA**

“qualified individual”

individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires

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**ADA**

“reasonable accommodation”

Required unless accommodation “would impose an undue hardship”

Reassignment to vacant position is not required unless position is vacant and employee is qualified.

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**Family Medical Leave Act**

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**FMLA**

Workers should not have to choose between the job they need and the family members they love and who need their care.

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**FMLA**

Eligible employees may take FMLA leave:

- For the birth or placement of a child for adoption or foster care
- To care for a spouse, son, daughter, or parent with a serious health condition
- For their own serious health condition
- Military Family Leave

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**FMLA**

Employers cannot:

- interfere with, restrain or deny employees' FMLA rights
- discriminate or retaliate against an employee for having exercised FMLA rights
- discharge or in any other way discriminate against an employee because of involvement in any proceeding related to FMLA
- use the taking of FMLA leave as a negative factor in employment actions

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**FMLA**

Amount of Leave

- Employee's workweek is basis for entitlement
- Eligible employees may take up to 12 workweeks of FMLA leave
- In calculating the amount of leave, employer must use the shortest increment the employer uses to account for other types of leave, provided it is not greater than one hour

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**Wage & Hour Claims**  
Fair Labor Standards Act

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**Wage & Hour**  
Classified as Exempt for Overtime  
Effective December 1, 2016  
\$913 per week or \$47,476 annually for a full-year worker  
A federal judge in Texas has issued a nationwide injunction that will temporarily prevent enforcement

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**Wage & Hour**  
Classified as Exempt for Overtime  
Exemptions:  
• Executive  
    ◦ Manages and has influence on employment decisions  
• Administrative  
    ◦ Office or non-manual work; and exercise discretion on matters of significance (school administrators)  
• Professionals  
    ◦ “learned professions” – doctor, attorney, teacher  
• Outside sales  
• Computer employees

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**First Amendment**

Freedom of Speech

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**First Amendment**

Congress shall make no law . . . abridging the freedom of speech

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**First Amendment – Free Speech**

Applied to the States by Supreme Court decisions by the Fourteenth Amendment

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### First Amendment – Free Speech

**FIRST:**

A government employee has first amendment rights when the employee speaks:

- 1. as a **citizen** (rather than as an employee)
- 2. on a matter of **public concern** (rather than on a matter solely of work-related concern)

**SECOND:**

If first test met (and thus employee has first amendment rights), then must **balance employee's first amendment rights against employer's interest in efficiency, orderly administration.**

*Pickering v. Board of Education*, 391 U.S. 563 (1968)

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### First Amendment – Free Speech

Examples of Issues of “Public Concern”:

- Public Fraud, Mismanagement
- Racial and Other Illegal Discrimination
- Sexual Harassment
- Use of Public Monies, Assets
- Public Policy
- Ethics, Professional Responsibility
- Statutory and Other Duties of Governmental Entities

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### First Amendment – Free Speech

Speaking as a “citizen”

Statements by public employees made pursuant to their employment or as a part of their job duties have no First Amendment protection.

- *Garcetti v. Ceballos*, 547 U.S. 410 (2006)

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## First Amendment – Free Speech

### Hypothetical

County Water District has a leak adjustment policy in its tariff that permits the Water District to adjust bills for leaks that are repaired and verified by a plumber.

County Water District customer and licensed plumber Jose Chavez submitted a request for adjustment based on a leak that he repaired at his house.

County Water District denied Mr. Chavez's request, indicating that the verification had to be received from a plumber other than the customer.

Two weeks later, a utility employee writes a letter to the editor supporting a presidential candidate's position to build a wall on the U.S.-Mexico border.

Mr. Chavez complains to the Water District officials about racial discrimination, who then terminate the utility employee's employment.

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## Kentucky's Whistleblower Act

### KRS 61.102

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## Kentucky's Whistleblower Act

prohibits any reprisal by certain public employers against an employee who in good faith discloses any facts or information relative to an actual or suspected violation of any law or mismanagement, waste, fraud, and abuse of authority

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**Kentucky's Whistleblower Act**

Employer

Includes water districts  
Davis v. Powell's Valley Water Dist., 920 S.W.2d 75, 78  
(Ky. Ct. App. 1995)

Not cities  
Cruey v. City of Somerset, 2012 WL 3257567, at \*4  
(E.D. Ky. Aug. 8, 2012)

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**Kentucky's Whistleblower Act**

Does Not Apply To

publicly known or available information  
Admin. Office of Courts v. Miller, 468 S.W.3d 323, 330  
(Ky. 2015)

disagreements with supervisors over  
job-related activities  
Moss v. Kentucky State Univ., 465 S.W.3d 457, 460  
(Ky. Ct. App. 2014)

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**Harrassment**

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**Harrasment**

Syed v. N. Kentucky Water Dist.,  
2010 WL 1235365, at \*1  
(E.D. Ky. Jan. 8, 2010)

Title VII of the Civil Rights Act  
Age Discrimination Act of 1967  
Kentucky Civil Rights Act

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Syed v. N. Kentucky Water Dist.

- Syed is of Pakistani descent and an adherent of the Islamic religion
- Employed as a temporary employee in financial department
- Water District had a vacancy for their Comptroller position
- CEO allegedly refused to hire Syed as Comptroller, seeking “younger” employee
- Water District gave Syed full-time employment as Senior Accountant
- Later, Syed alleges WD stripped him of certain duties
- Claimed age, race, and religious discrimination; hostile work environment

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**Hostile Work Environment**

(1) he belongs to a protected group;  
(2) he was subject to unwelcome harassment;  
(3) the harassment was based on that protected group status;  
(4) the harassment affected a term, condition, or privilege of his employment; and  
(5) the existence of employer liability.

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### Hostile Work Environment

Protected group examples

- Sex & Gender
- Race & Color
- Religion & Creed
- National Origin
- Disability
- Age
- Sexual Orientation & Gender Identity
- Other Protected Classes (i.e., veteran status)

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### Hostile Work Environment

- When an environment is objectively and subjectively offensive so that a reasonable person would find it hostile and the victim actually perceived it to be so.
- Factors considered include the frequency of the conduct; its severity; whether it is physically threatening; and whether it unreasonably interferes with an employee's work performance.

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### Hostile Work Environment

Examples of potential "harassment"

- Obscene gestures
- Inappropriate pictures, cartoons, posters, graffiti, e-mail
- Off-color jokes, comments, slurs, epithets
- Threats or Insults
- Exposing oneself
- Propositions
- Inappropriate touching
- Stalking, staring, leering
- Inappropriate gifts

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## Hostile Work Environment- Employer Liability

Syed v. N. Kentucky Water Dist.

### Level of Management

- Human Resources Manager told him that “Europeans know how to deal with you people”
- Accounting Assistant gives him (once) “the finger”
- Senior Accountant calls him a “muslim terrorist”

### Employee must take advantage of corrective opportunities

- CEO and VP employment decisions were 9 months before alleged discriminatory acts
- District had anti-harassment policies that Syed knew about
- Syed never complained about harassment

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## OPEN RECORDS ACT & OPEN MEETINGS ACT

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## Open Records Act & Open Meetings Act

An agency is subject to penalties for a “willful” violation.

ORA - KRS 61.882  
OMA - KRS 61.848

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### Open Records Act & Open Meetings Act

“Willful” connotes that the agency withheld requested records without plausible justification and with conscious disregard of the requester's rights.

City of Fort Thomas v. Cincinnati Enquirer, 406 S.W.3d 842, 854 (Ky. 2013); citing Bowling v. LFUCG, 172 S.W.3d 333, 345 (Ky. 2005)

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### Open Records Act & Open Meetings Act

Bd. of Commissioners of the City of Danville, Kentucky v. Advocate Commc'ns, Inc., 2016 WL 1739310, at \*4 (Ky. Ct. App. Apr. 29, 2016)

- City Commissioners met in closed session to discuss possible amount of bid on real property that was being auctioned
- City failed to respond to OMA complaint within 3 days
- Court of Appeals suggests that failure to respond within 3 days is a willful violation, subjecting agency to penalties
- Court held that it was improper for City to agree to hire bidding agent in closed session.
- Court held that there was no OMA exception applicable, and therefore, the City violated the OMA

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### Open Records Act & Open Meetings Act

#### OMA Exception

Deliberations on the future acquisition or sale of real property by a public agency, but only when publicity would be likely to affect the value of a specific piece of property to be acquired for public use or sold by a public agency.

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## Open Records Act & Open Meetings Act

Bd. of Commissioners of the City of Danville, Kentucky v. Advocate Commc'ns, Inc., 2016 WL 1739310, at \*4 (Ky. Ct. App. Apr. 29, 2016)

### Important Court statements:

- Public agency can only have deliberations or discussions in closed session
- Public agencies cannot take final action on bidding in closed session
- The City did not take action on the bidding in open session prior to the auction
- Decision to participate in auction required binding "non-contingent" contract to participate
- City's actions in closed session violated the OMA without plausible justification and with conscious disregard of the requester's rights
- City declined to respond to newspaper's agency complaint

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## Open Records Act & Open Meetings Act

### Tips

Comply with the law

Respond within 3 days

After lawsuit is filed, plead and pursue finding of good faith

Argue that "willful" violation requires showing that the public agency "acted in bad faith with an intent to violate the Open Records Act and without plausible explanation for the alleged errors."

Sinha, M.D. v. Univ. of Kentucky, 284 S.W.3d 159, 162 (Ky. App. 2008) (citing Bowling v. LFUCG, 172 S.W.3d 333, 345 (Ky. 2005))

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## Extending Water Service into Another's Territory

7 U.S.C. § 1926(b)

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**7 U.S.C. § 1926(b)**

A plaintiff must establish that

- 1) it is an 'association' within the meaning of the Act;
- 2) it has a qualifying outstanding federal loan obligation; and
- 3) it has provided or made service available in the disputed area.

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**7 U.S.C. § 1926(b)**

Has the WD provide or made service available in the disputed area?

- 1) Pipes in the ground?
  - a) To the property
  - b) Adjacent or within the property
- 2) Legal right under state law to serve the disputed territory
  - a) CPCN from PSC Lexington-S. Elkhorn Water Dist. v. City of Wilmore, 93 F.3d 230, 238 (6th Cir. 1996)
  - b) Service territory

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**TODD OSTERLOH**



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tosterloh@sturgillturner.com

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# **Kentucky Water Workforce Survey Results**

**Presenters: Donna McNeil and Valerie Lucas**

**Other Co-Authors: Emily Koyagi, Lindell  
Ormsbee, and James Shelley**

 **Kentucky Water  
Resources Research Institute**

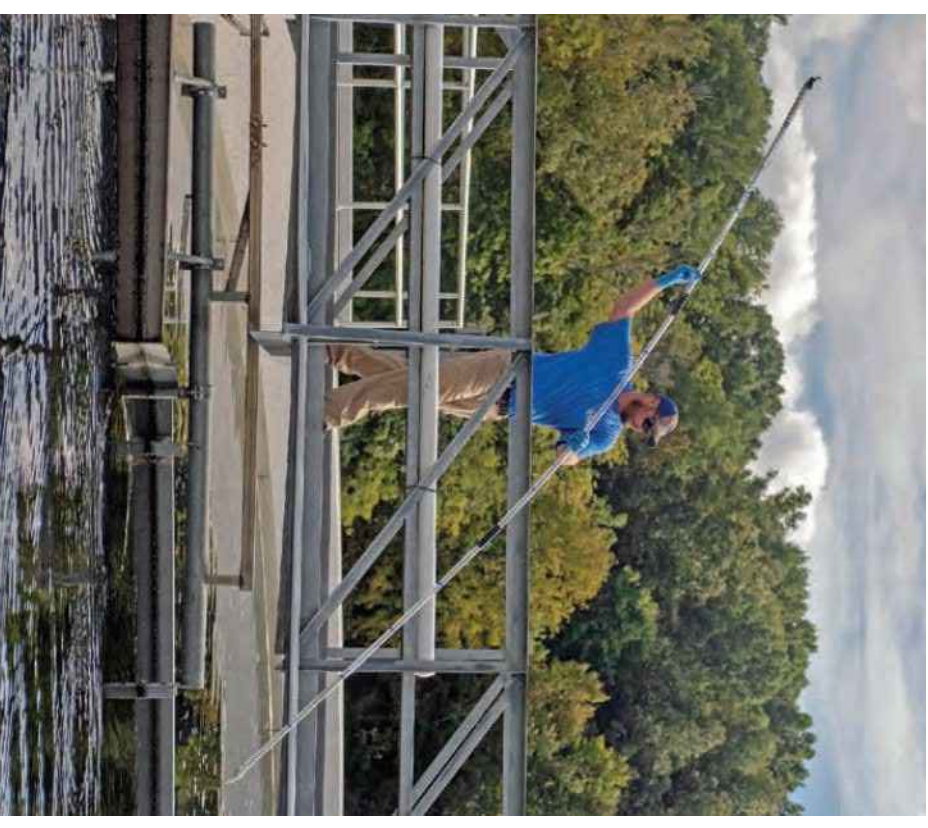
# Operator Recruitment and Development (ORD) Committee

Committee members:

- Valerie Lucas, Clean Water Professionals
- Jessica Wilhoite and Veronica Roland, Kentucky Operator Certification Program
- Donna McNeil, KWWRI
- Kay Sanborn, KY-TN American Water Works Association
- Doug Kimbler, Bowling Green Municipal Utilities
- Kim Padgett and Maggie Mahan, Kentucky Rural Community Assistance Program
- Heather Stevenson and Jason Pennell, Kentucky Rural Water Association
- Robin Strader, Kentucky Wastewater Operators Certification Board Vice Chair
- Mary Carol Wagner, Northern Kentucky Water District
- Adam Scott, Kentucky Water and Wastewater Operators Association
- Alicia Jacobs, Amanda Lefevre, Joseph Uliasz, Energy and Environment Cabinet Representatives

# ORD's Goals and Objectives

- Bring operator recruitment and development issues to the forefront.
- Gain a better understanding of recruitment and retention in the water workforce.
- Help decision makers better understand operator challenges.



# Kentucky Water Workforce Survey

- Two Surveys:
  - Operator Survey (36 questions)
  - Manager Survey (31 questions)
- Open from May 3, 2022 – June 7, 2022
- Recruitment methods:
  - Email
  - Social media
  - Newsletters
  - Promotion at events

UNIVERSITY OF KENTUCKY RESEARCH



**Do You Have  
Experience as a  
Manager or  
Operator at a Water  
Utility in Kentucky?**

Researchers at the University of Kentucky invite you to take part in a survey about your experience as a manager or operator in the water workforce. The purpose of this research study is to learn more about operator recruitment and retention. The goal is to gather information about Kentucky's water workforce and gain a better understanding of the challenges, barriers, and opportunities in hiring and retaining operators. Interested participants will be asked to take a brief 10 - 15 minute online survey. Survey participants will be given a chance to win a gift card after completing the study.

**You may be eligible to participate if you:**

- Are over the age of 18
- Have experience as a manager or operator at a water utility

**Scan the QR code or visit the link below to learn more:**



<https://bit.ly/KYWaterWorkforceSurvey>

**For more information:**

Emily Koyagi  
emilykoyagi@uky.edu  
859-312-7321

 University of  
Kentucky  
Research  
 Kentucky Water  
Resources Research  
Institute

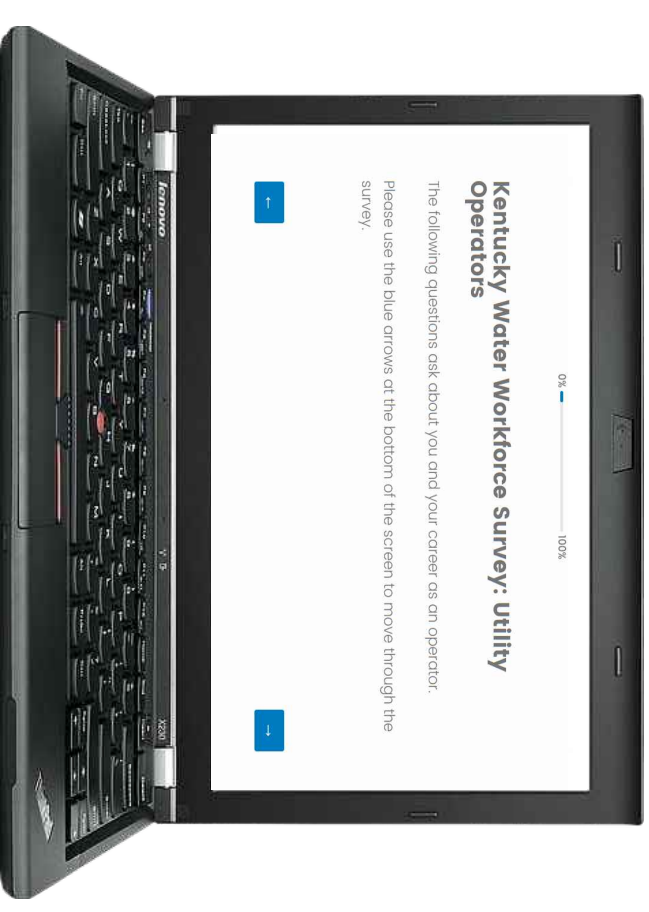
www.ukclinicalresearch.com

water management study

KWRRI-002\_1/yr #

# Survey Response

- Total respondents: 635
  - Operator Survey: 415
  - Manager Survey: 220



# Operator Demographics



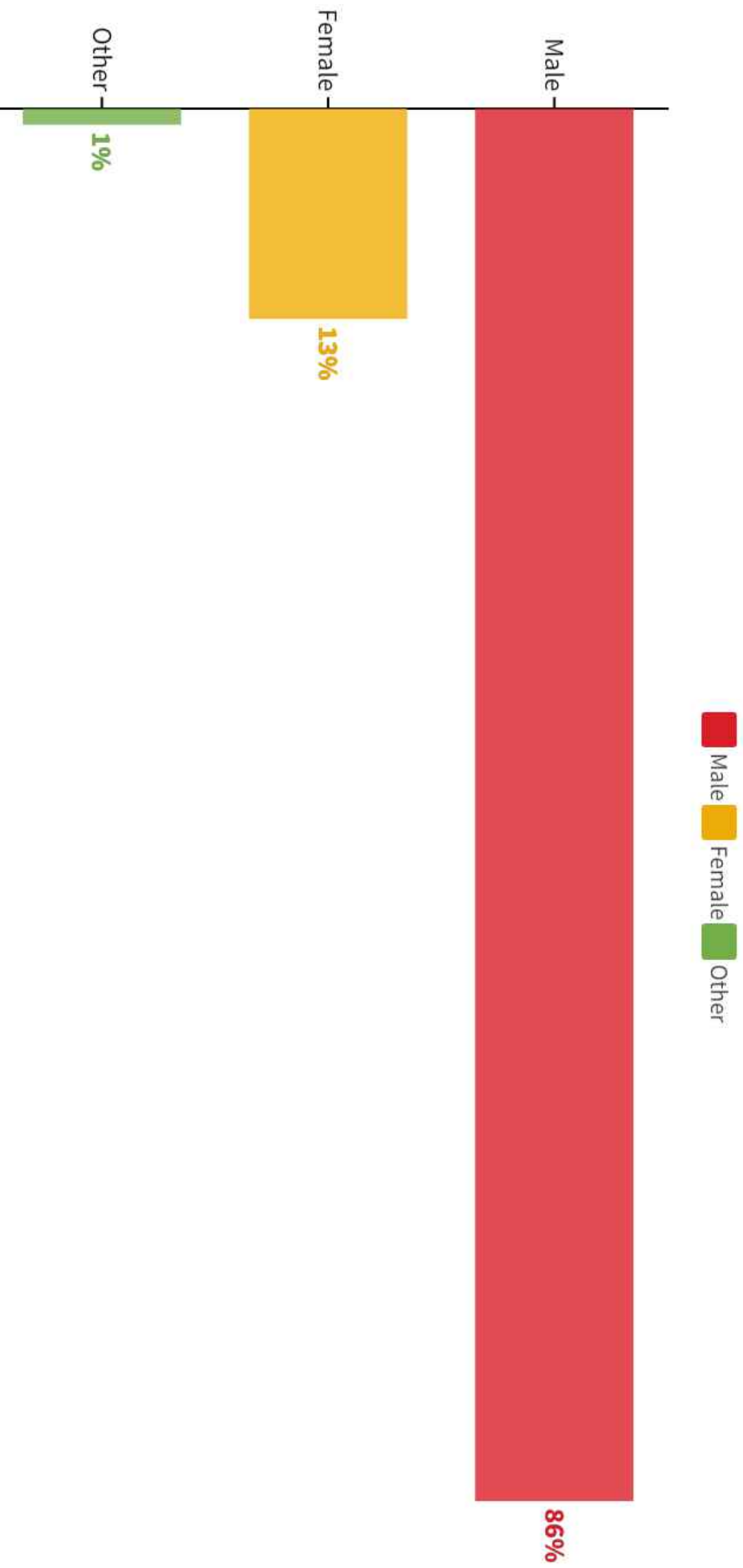
**Kentucky Water**

**Resources Research Institute**



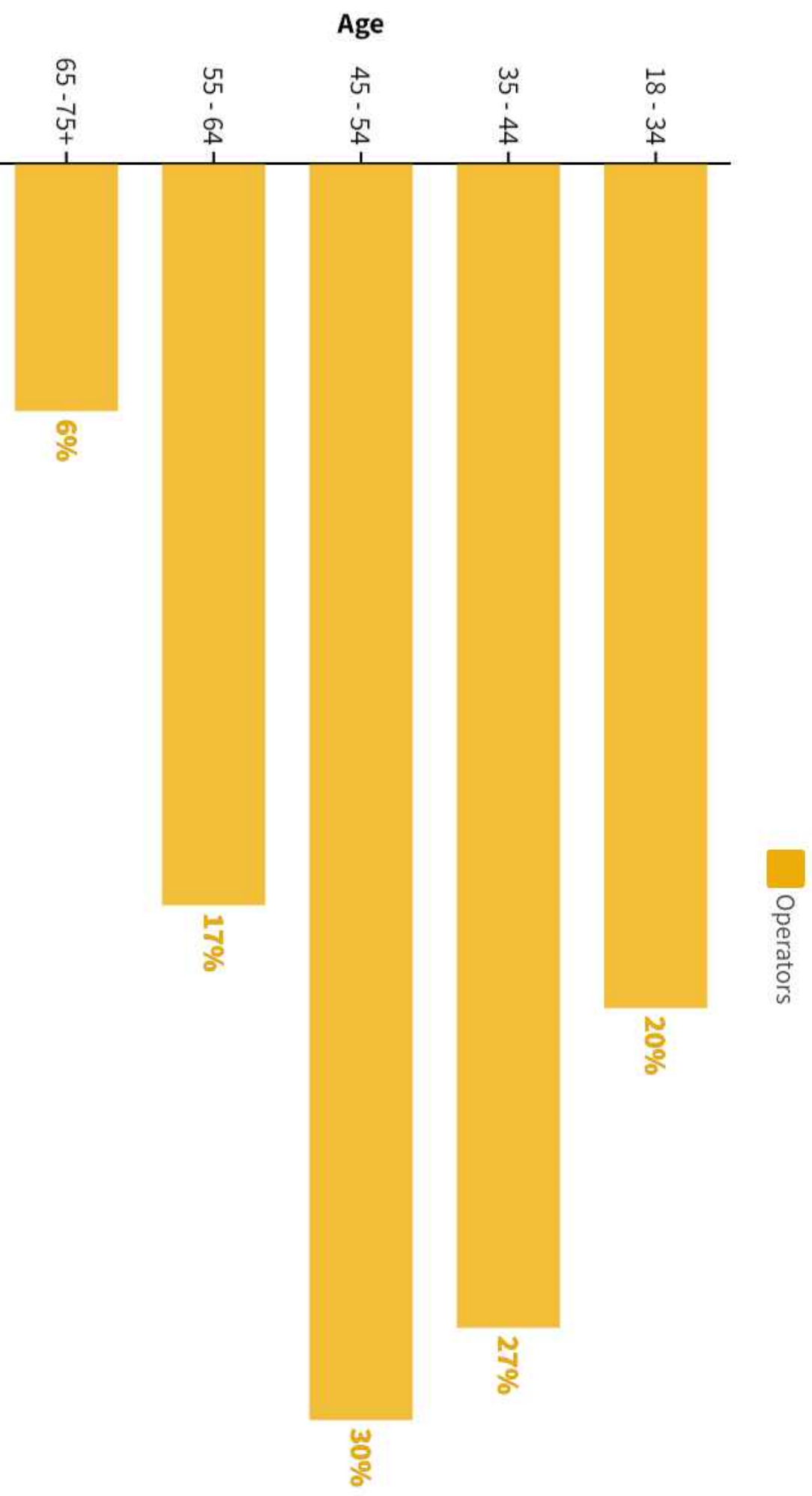
# Gender of Respondents

## KWWS Operator Survey



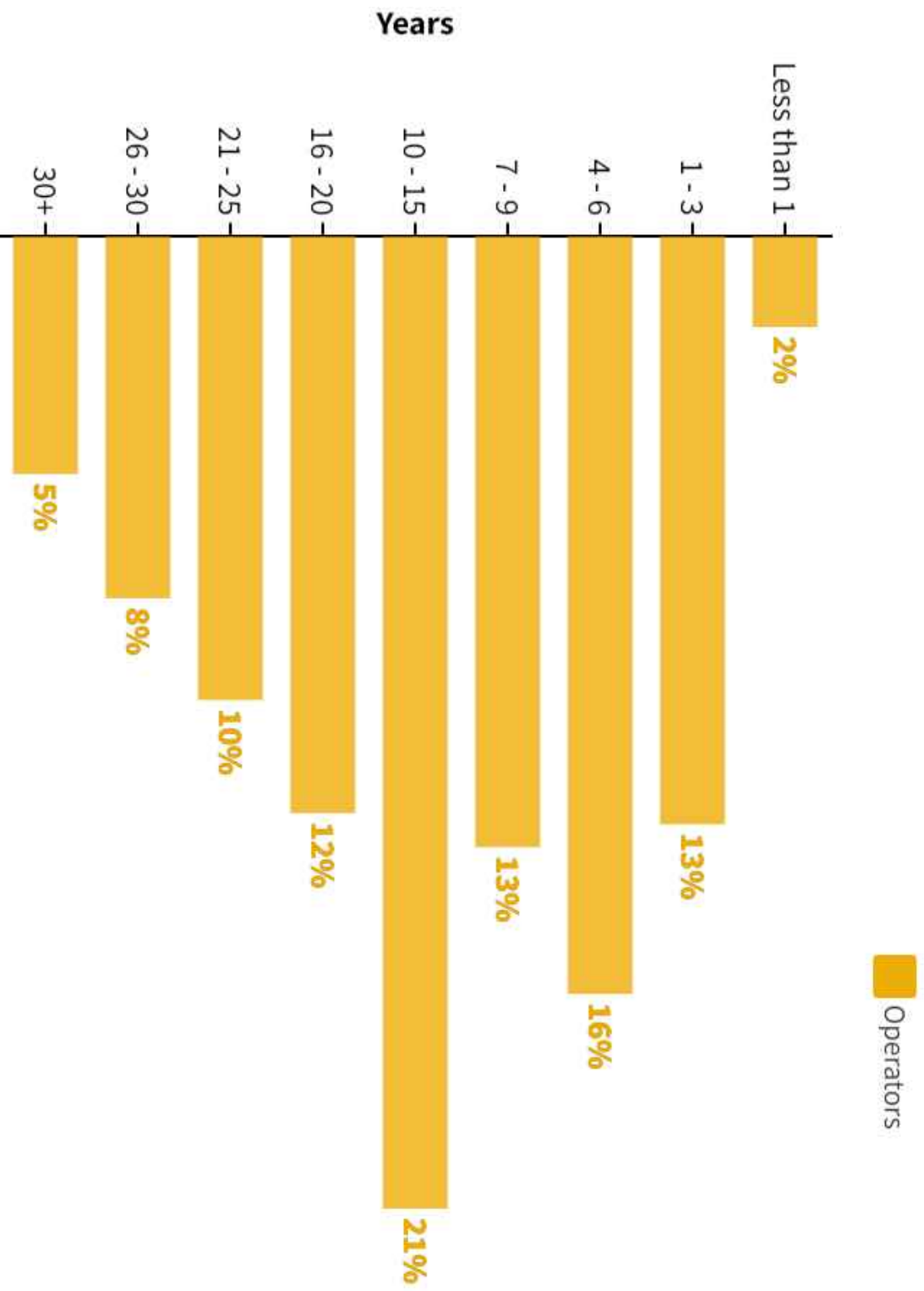
# Age of Respondents

## KWWS Operator Survey



# How Many Years Have You Worked At The Utility?

KWWS Operator Survey



# Utility Demographics



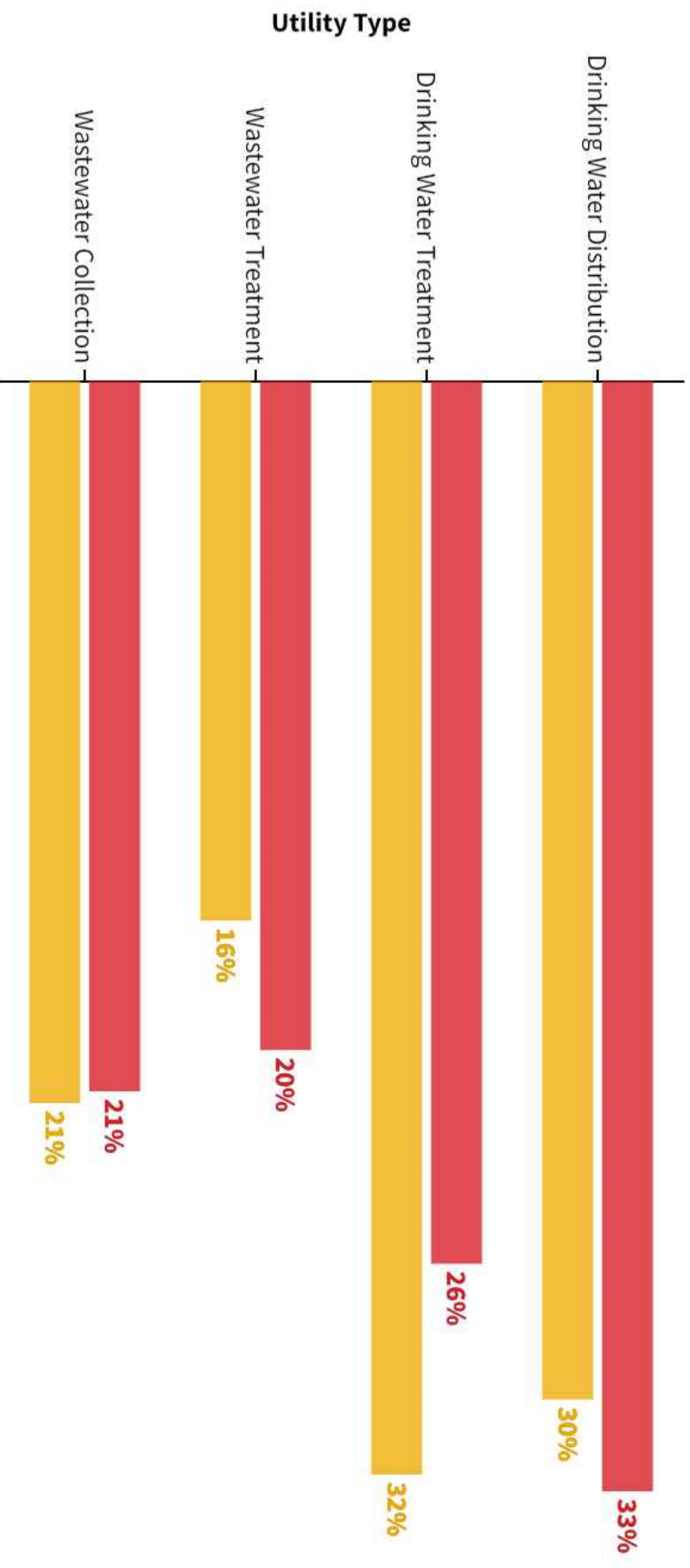
*Kentucky Water*

*Resources Research Institute*

# Which Of The Following Describe Your Utility?

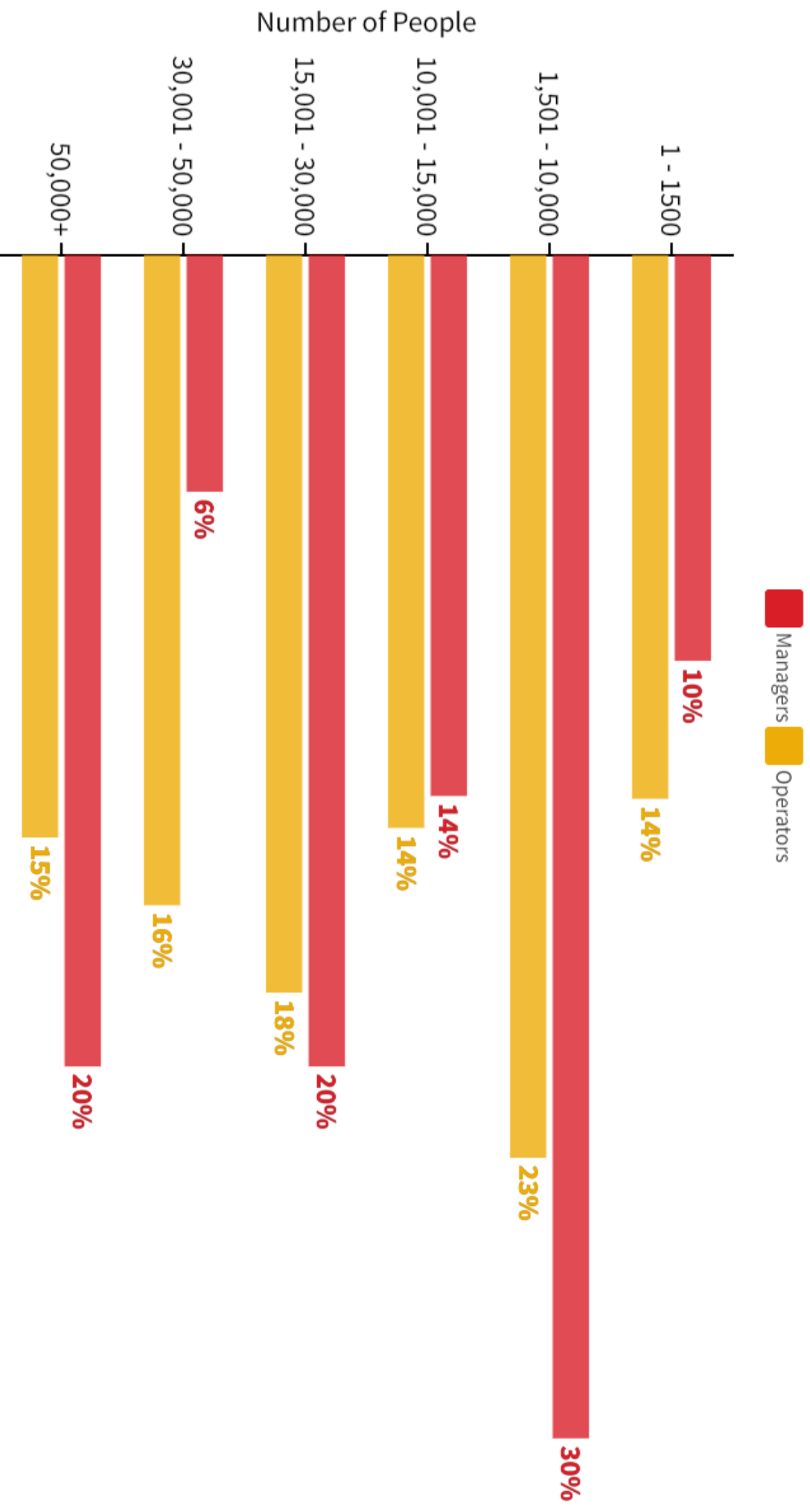
KWWS Operator/Manager Survey

Managers Operators

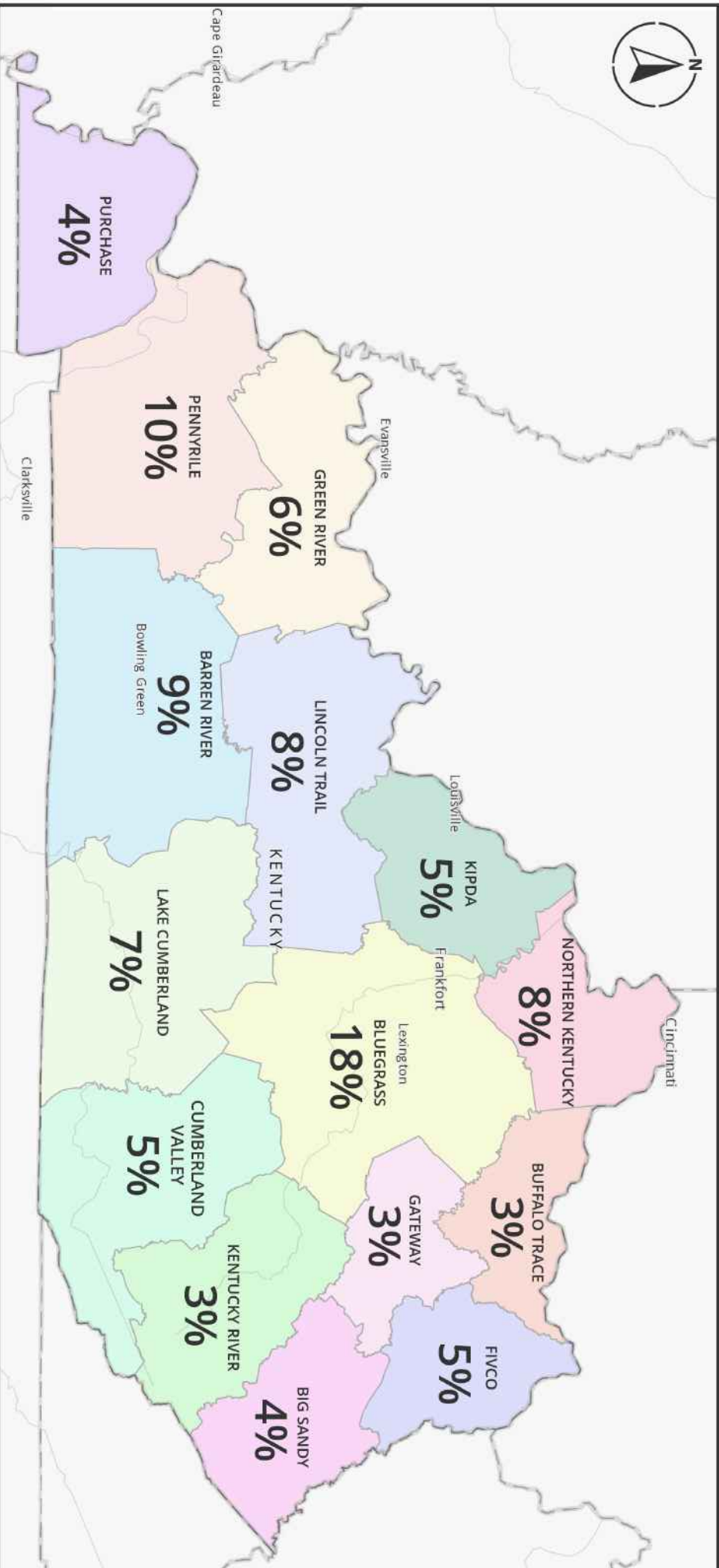


# How Many People Does your Utility Directly Serve?

## KWWS Operator/Manager Survey



# Spatial Distribution of Survey Respondents - Area Development Districts



- Area Development Districts**
- Barren River
  - Big Sandy
  - Bluegrass
  - Buffalo Trace
  - Cumberland Valley
  - FIVCO
  - Gateway
  - Green River
  - Kentucky River
  - Lake Cumberland
  - Lincoln Trail
  - Northern Kentucky
  - Pennyrile
  - Purchase

Map Produced By: The Kentucky Water Resources Research Institute.

# Utility Challenges



*Kentucky Water*

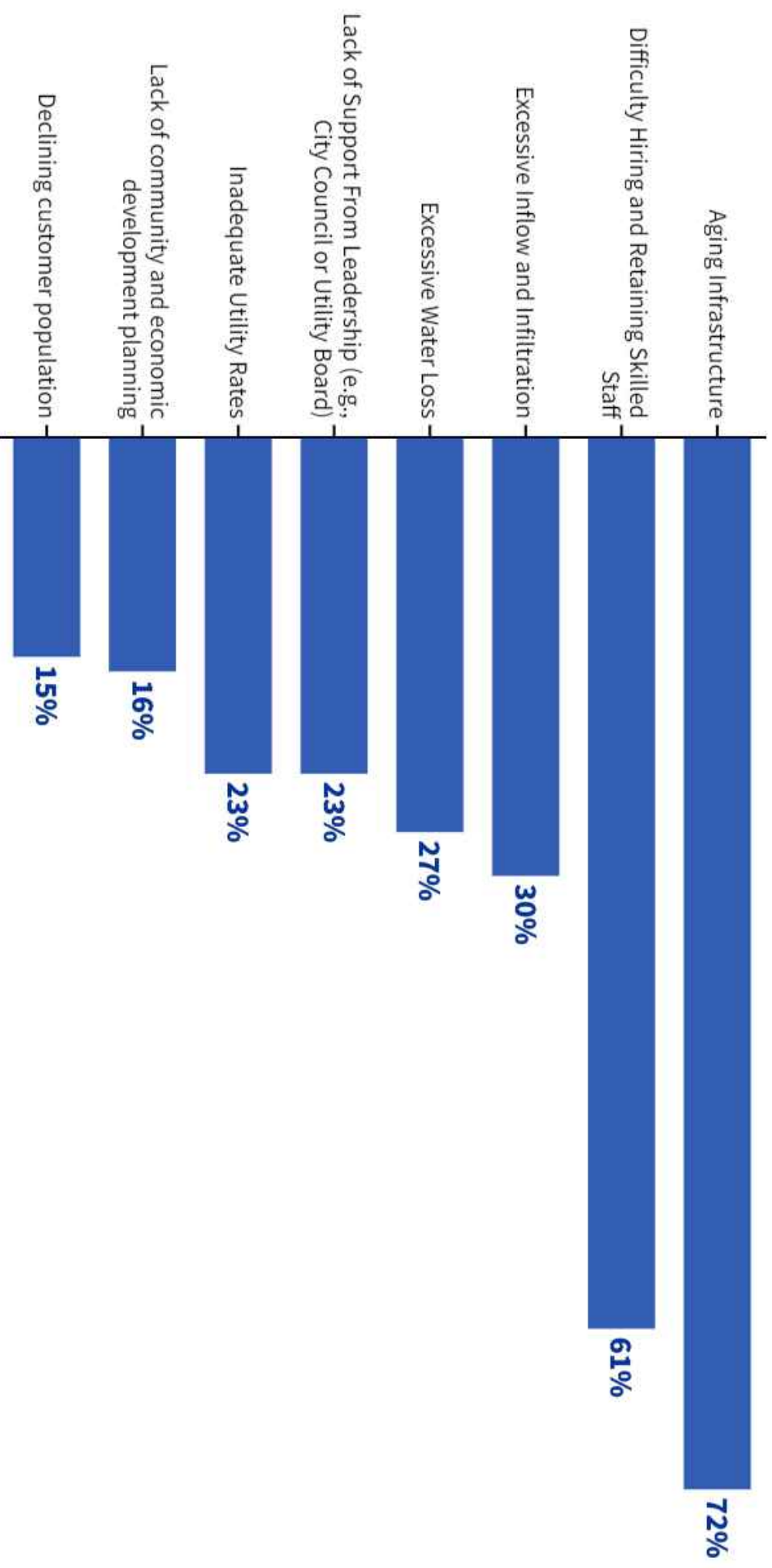
Resources Research Institute



# What Type Of Operations Challenges Does Your Utility Face?

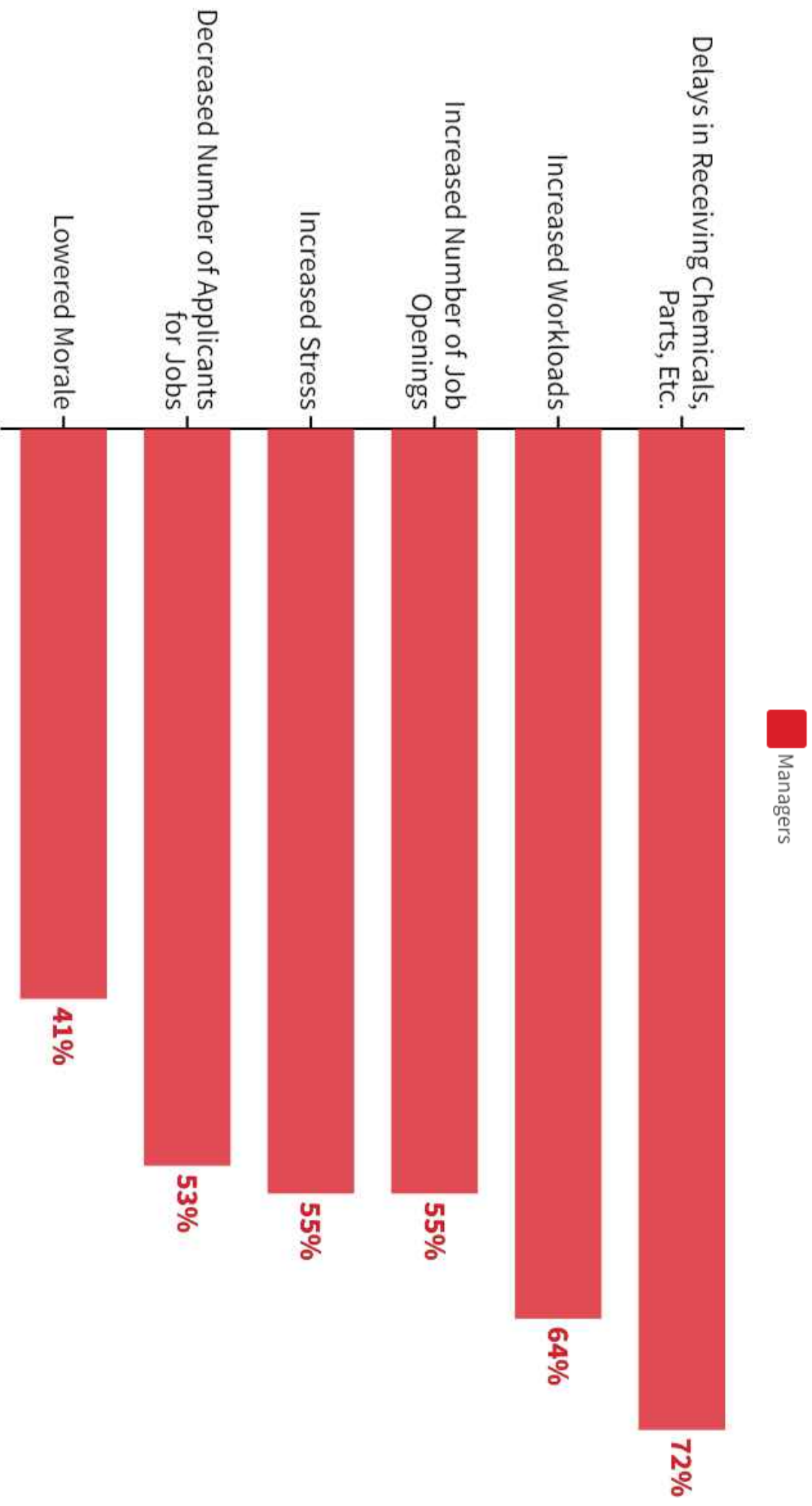
KWWS Operator/Manager Survey

All Respondents



## Over the last two years, which of the following has your utility experienced?

KWWS Manager Survey



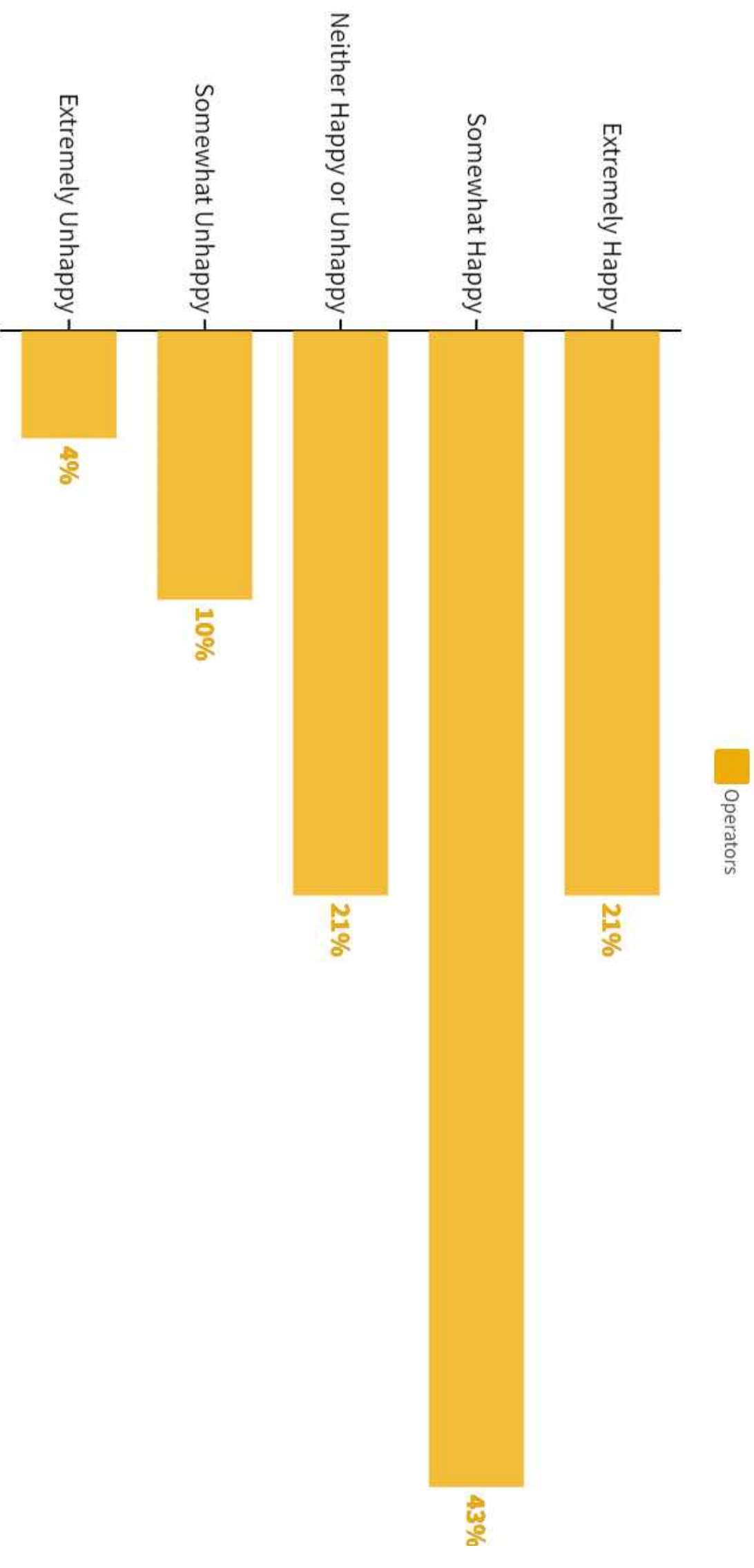
# Job Satisfaction



Kentucky Water  
Resources Research Institute

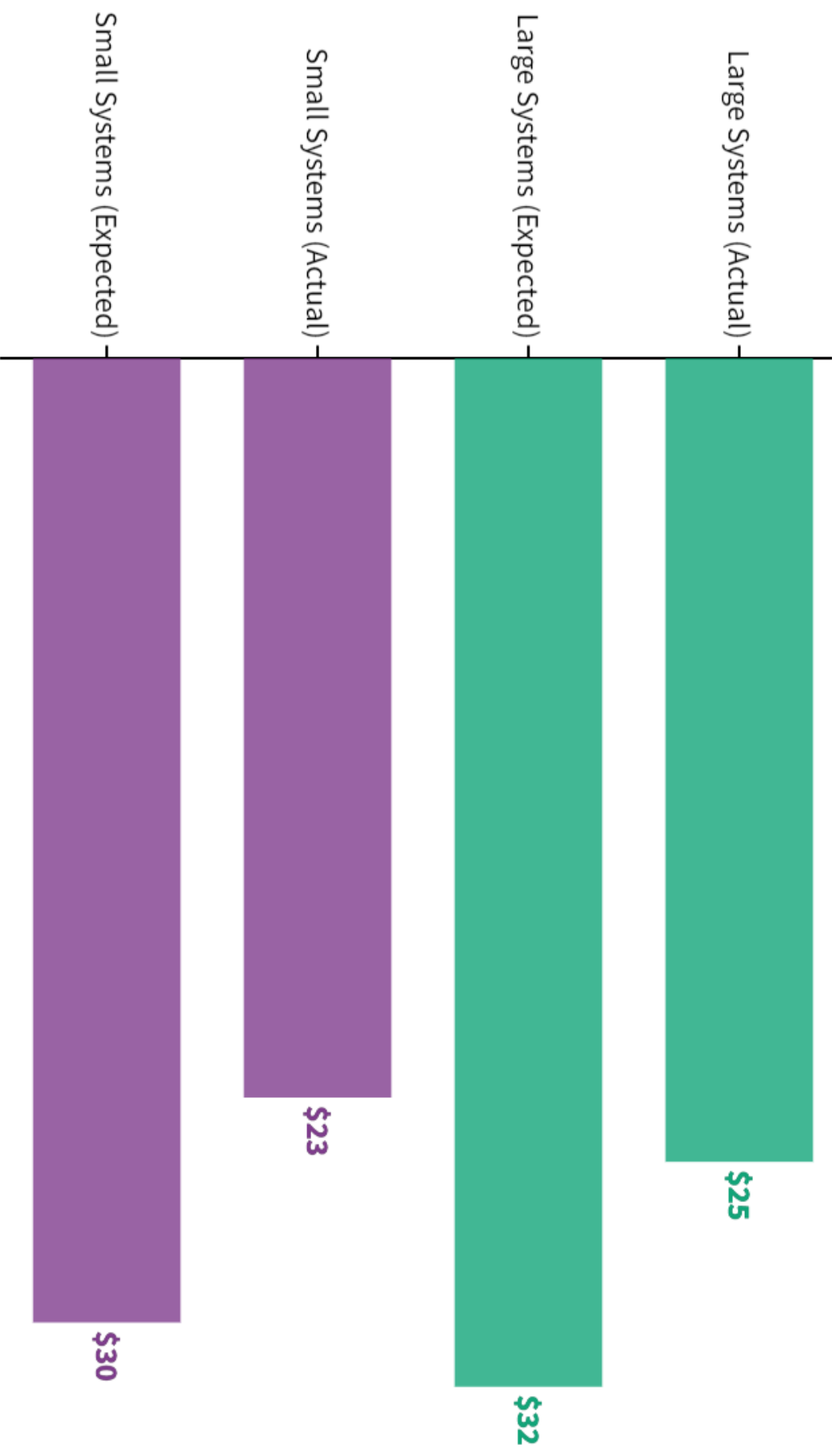
# How Happy Are You At Work?

## KWWS Operator Survey



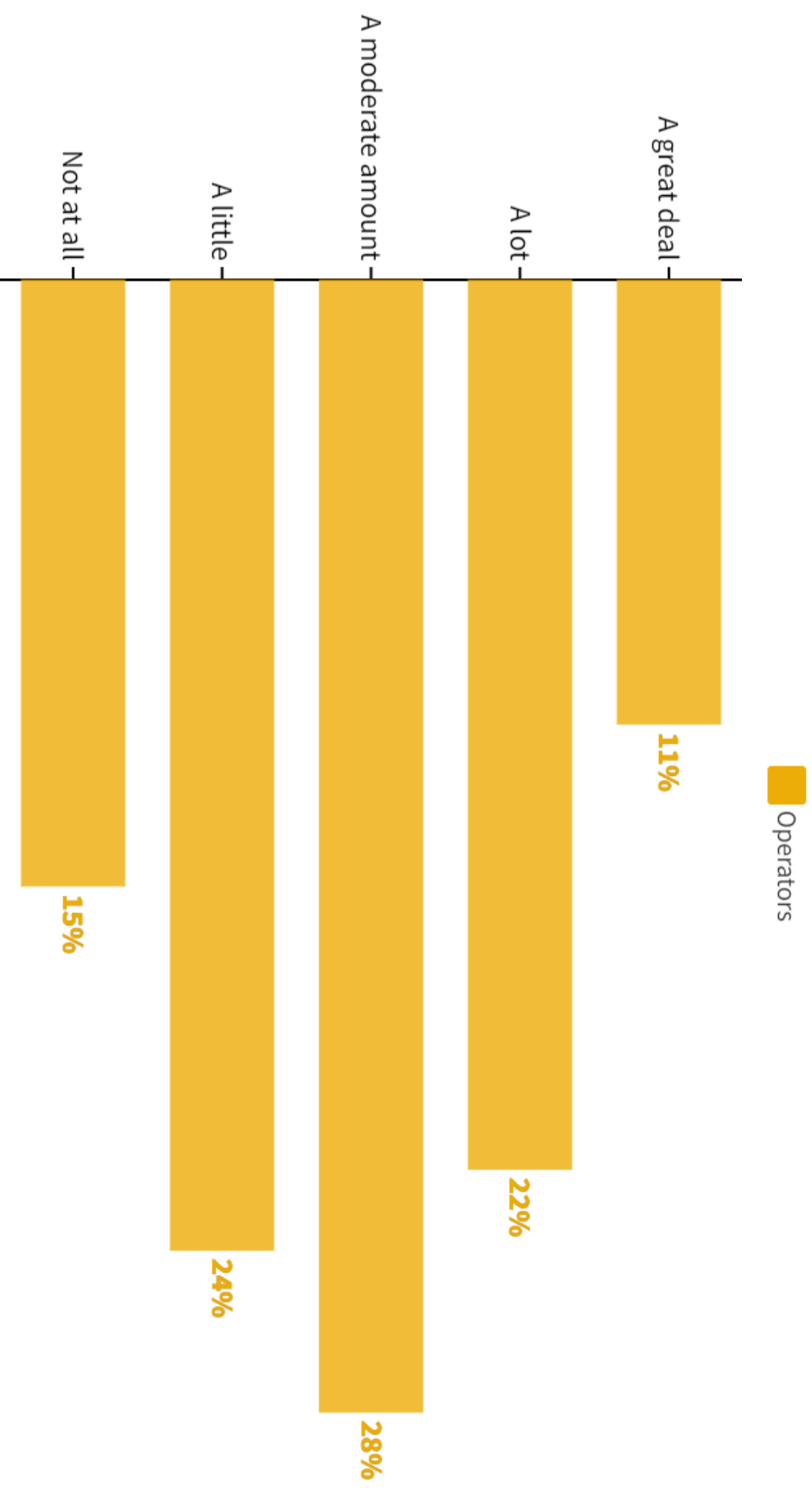
# Median Hourly Wage | Pay Expectations

KWWS Operator Survey



# Do You Feel Appreciated By Your Utility?

KWWS Operator Survey



# **Over the last two years, which of the following have you experienced?**

- Increased workload: 66%
- Increased stress: 60%
- Lower morale: 46%
- Increased work hours: 37%
- Financial hardships: 31%



# Relationship with Decision Makers

How well do your utility's decision makers understand what you do in your job?

- **51% responded slightly well or not well at all.**

How often do your utility's decision makers communicate with the operators?

- **55% responded rarely or never.**





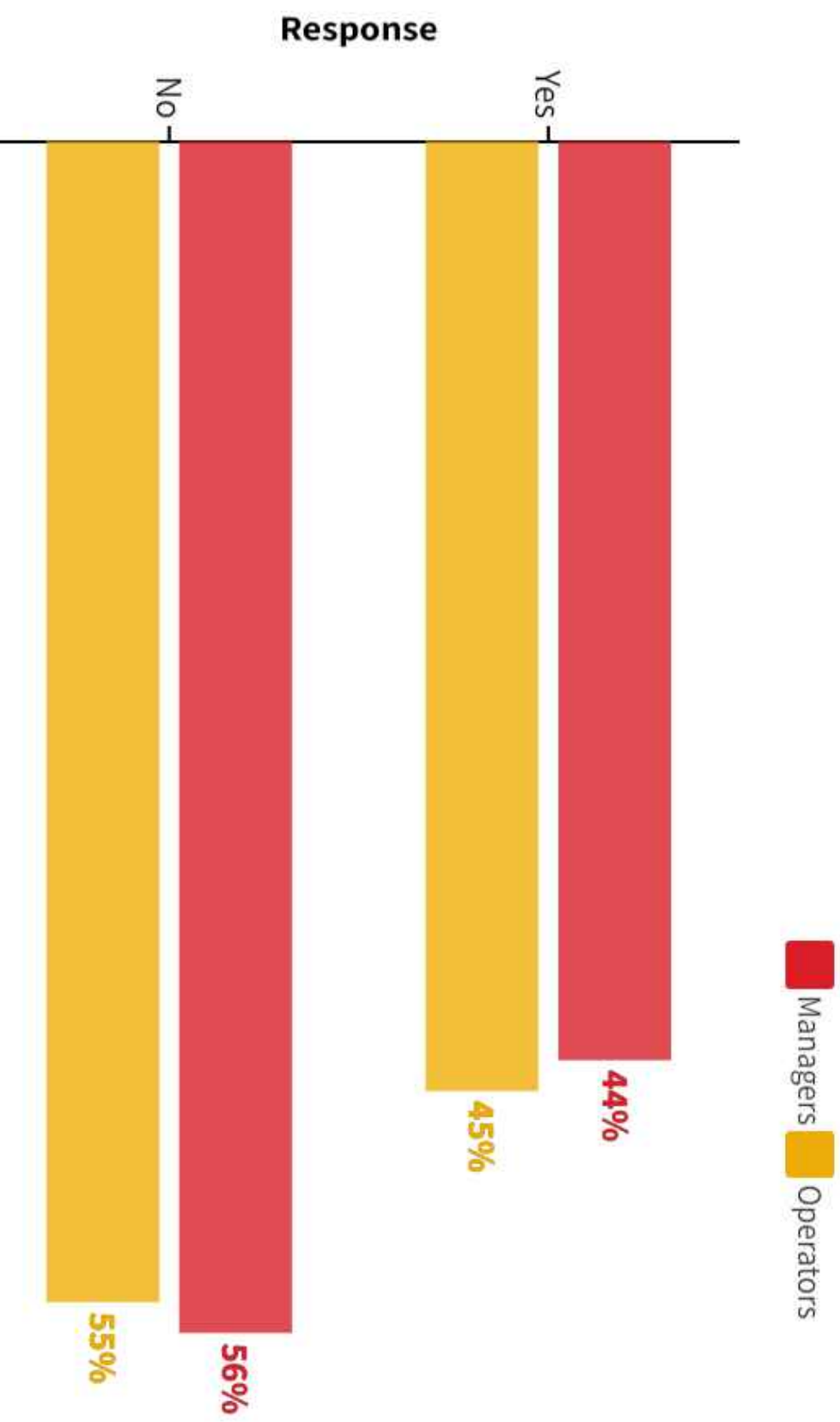
# Recruitment



*Kentucky Water*  
Resources Research Institute

# In Your Opinion, Does Your Utility Have Enough Operators?

KWWS Operator/Manager Survey



# Barriers to Hiring Operators

- Rate of pay – 74%
- Lack of qualified applicants – 68%
- Available shifts are not desirable – 34%
- Type of work – 32%
- Financial limitations at the utility – 30%
- Certification process – 28%
- Certification requirements – 25%
- Applicants unwilling to become certified – 22%
- City Council or Utility Board – 16%
- Lack of benefits – 15%



# What benefits does your utility provide?

Benefit	Percent of Respondents
Paid sick and vacation	90%
Paid holidays	89%
Health insurance	86%
Retirement benefits	82%
Paid time and travel to attend trainings	77%
Paid or reimbursed certification fees	73%
Overtime	69%
Life and disability insurance	64%
Annual raises	64%
Paid or reimbursed tuition or training expenses	63%

# Retention



*Kentucky Water  
Resources Research Institute*

# What reasons do operators give for leaving the job?

- Better pay in another job opportunity – 72%
- Retiring – 62%
- Undesirable working hours (on-call, etc.) – 38%
- Career advancement – 36%
- Better benefits – 35%
- Too much responsibility – 22%
- No longer want to work in the water sector – 17%
- Certification exam and process is too difficult – 16%



## Aspects of the Job:

# Somewhat Satisfied or Extremely Satisfied

### Operator Responses:

- Hours – 70%
- Type of Work– 69%
- Certification Renewal Process – 62%
- Preferred Shifts– 60%

### Manager Responses:

- Hours – 67%
- Type of Work – 67%
- Certification Renewal Process – 54%
- Preferred Shifts– 53%



# Aspects of the Job: Somewhat Dissatisfied or Extremely Dissatisfied

## Operator Responses:

- Pay – 39%
- Certification Exam Process – 22%
- Workload – 21%
- Preferred Shifts– 17%

## Manager Responses:

- Pay – 38%
- Certification Exam Process – 29%
- Preferred Shifts– 20%
- Workload – 20%





# Retention: Key Points to Consider

- 39% are considering leaving the utility.
- 28% are considering leaving the water industry.
- 37% believe that they are not being paid a fair amount for the work.
- 32% believe that work is not distributed evenly at their utility.
- 68% are satisfied with the benefits they receive.
- 76% like doing the tasks they do at work.
- 70% are given the equipment and tools I need to do my job effectively.



# Succession Planning

Are you currently eligible to retire?

- **23% of operator survey respondents are eligible.**

Does your utility have a succession plan in place if a manager leaves or retires?

- **45% do not**

Does your utility have a succession plan in place if an operator leaves or retires?

- **46% do not.**



# Future Steps



Kentucky Water  
Resources Research Institute

# Next Steps

- Additional data analysis
- Final report
- Present findings to water sector
- Present findings to public officials
- Start a conversation – plant seeds of thought
- Follow-up studies/surveys

# Questions?

  
Kentucky Water  
Resources Research  
Institute

Donna McNeil, EIT  
Research Engineer Associate  
Phone: 502-330-0015  
Email: [Donna.McNeil@uky.edu](mailto:Donna.McNeil@uky.edu)

  
Clean Water  
Professionals  
*for the future of water*

Valerie A. Lucas, PE  
Clean Water Professionals of KY & TN  
Phone: 502-468-4772  
Email: [Valerie.Lucas@cleanwaterprofessionals.org](mailto:Valerie.Lucas@cleanwaterprofessionals.org)

STOLL KEENON OGDEN  PLLC

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

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

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**

- Certificate Basics
- Preparing An Application for CPCN
- Debt Authorizations: The Basics
- Preparing An Authorization Application

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STOLL KEENON OGDEN  PLLC

**CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY: THE BASICS**

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STOLL KEENON OGDEN PLLC 

**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 . . . 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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STOLL KEENON OGDEN PLLC 

**PURPOSE OF STATUTE**

- Counteract Improper Incentives in Rate of Return Regulatory Scheme
- Prevent Inefficient Investment
- Avoid Wasteful Duplication
- Ensure Project's Technically Feasibility

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STOLL KEENON OGDEN PLLC 

**WHAT REQUIRES A CERTIFICATE?**

- Construction of Any Plant/Facility
- Installing Equipment on Large Scale
- Repurposing of An Existing Facility
- Extensive Repairs of Existing Facility
- **Acquisition of Facility???**
- **Pre-construction Contracting**

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STOLL KEENON OGDEN PLLC 

**WHAT REQUIRES A CERTIFICATE?**

- Construction of Office Building
- Purchase and Installation of Advance Metering Infrastructure (AMI)

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**DOES NOT REQUIRE A CERTIFICATE**

- Purchase of Building or Land
- Maintenance Projects
- Demolition/Destruction of Existing Facility

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**KRS 278.020(1): EXCEPTIONS**

- Service Connections to Electric Consuming Facilities By Retail Electric Suppliers
- Ordinary Extensions of Existing Systems in the usual course of Business
- Water District/Association Exception

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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, §16(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
- Thorough Review of **ALL ALTERNATIVES**
- **Any Duplication Requires Formal Review**

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**EXTENSIONS IN THE ORDINARY COURSE:  
MATERIALLY AFFECT**

- Percentage of Existing Net Utility Plant
  - 10 Percent Rule (**Abandoned**)
  - 3 Percent Rule – Case No. 2019-00257
  - 1 Percent Rule – Case No. 2014-00171
- Issuing Debt is **NOT A DECISIVE FACTOR**
- Project Cost is **A FACTOR**
- Each Project is considered individually

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**EXTENSIONS IN THE ORDINARY COURSE:  
MATERIALLY AFFECT**

- Projects Financed With Others' Funds
  - Case No. 2014-00368
  - Case No. 2018-00164
  - Case No. 2017-00195
  - Cases No. 2019-00067/No. 2020-00344
- **No Material Effect** if Customer financed
- **No Effect** on Utility's Financial Condition

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**PROJECTS FINANCED WITH  
OTHERS' FUNDS: CASE NO. 2014-00368**

- IOU to construct gas line to serve industrial customer
- Gas Line = 55% of Net Utility Plant
- Customer pays cost
- No increase to Utility Plant
- No Rate Increase
- **NO MATERIAL EFFECT – NO CPCN**

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**PROJECTS FINANCED WITH OTHERS' FUNDS: CASE NO. 2017-00195**

- IOU to relocate gas line running through landfill
- Landfill requests,pays most of relocate costs
- IOU's share of cost deemed too small to materially affect its financial condition
- No Rate Increase
- **NO MATERIAL EFFECT – NO CPCN**

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**PROJECTS FINANCED WITH OTHERS' FUNDS: CASES NO. 2019-00067 & NO. 2020-00344**

- \$16.5 Million Projects at Fort Knox
- Projects = 31.1% of Net Utility Plant
- US Govt funding entire project cost
- No increase to other customers' rates
- No affect on utility's financial condition
- **NO MATERIAL EFFECT – NO CPCN**

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**PROJECTS FINANCED WITH OTHERS' FUNDS: GOVERNMENT GRANTS**

- PSC Staff: No material effect on financial condition if project funded with government grants
- PSC Staff Opinion 2020-007: \$648K Tank Replacement Funded with ARC Grant has no impact on Water District's financial condition
- 2006 PSC Staff Opinion (PRIDE Grant)
- 2002 PSC Staff Opinion (KIA Grant)

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**EXTENSIONS IN THE ORDINARY COURSE:  
MATERIALLY AFFECT**

- Implications for projects funded with American Recovery and Reinvestment Act/Bipartisan Infrastructure Law
- Totally Funded: **No Certificate Required**
- Partially Funded: Certificate **Possibly Not Required**

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**EXTENSIONS IN THE ORDINARY COURSE:  
REPAIRS OR REPLACEMENT**

- Proposed Amendment to 807 KAR 5:001, §15
- A certificate of public convenience and necessity shall not be required for any water district created pursuant to KRS Chapter 74, water association formed under KRS Chapter 273, or any other utility that provides the services described in KRS Chapter 278.010(3)(b) or KRS Chapter 278.010(3)(f) that intends to **replace in-kind, restore, repair or fix any facility** as a result of weather events occurring on or between July 26, 2022 and July 30, 2022. Any replacement, restoration, repair or fix shall be deemed **extensions in the ordinary course of business**.

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**“WATER DISTRICT EXCEPTION”**

- KRS 278.020(1) amended in 2018
- Applies to **Class A & B** Water District & Assn
- Applies to **“water line extension or improvement project”**
- No Certificate required if:
  - Total Cost < \$500,000 **OR**
  - **NO** long-term debt **AND NO** rate increase
- Not applicable to Sewer Projects

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**“WATER DISTRICT EXCEPTION”**

- PSC Initially Limited Applicability To Construction of Water Mains
- Case No. 2016-00255: “[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 PSC Staff Opinion No. 2012-024

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**“WATER DISTRICT EXCEPTION”**

- 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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**“WATER DISTRICT EXCEPTION”**

- PSC Case No. 2018-00355
- WD to construct booster station, 31,300 LF of 6” and 8” water line, & 2 ground storage tanks
- Tanks’ cost (\$544,000) = 28% of total project cost
- Project totally financed through AML money
- PSC: Project is “waterline extension or improvement project”
- Exception applies; No certificate required

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### ANALYTICAL FRAMEWORK

- What is the Action?
- Does Action Fall Within An Exception?
  - Water District Exception?
    - Water Main Extension or Improvement?
    - Less than \$500,000?
    - No long-term debt or no rate increase?
  - Ordinary Extension In Usual Course?
    - Wasteful Duplication?
    - Interferes with Another Utility's Certificate?
    - Any Material Effect on Utility's Financial Condition?

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### WHEN IN DOUBT

- CYA: Private Attorney Opinion Letter
  - Thorough Analysis Essential
- Request Declaratory Order
- Avoid Requests for Staff Opinion
- DO **NOT** Request A Deviation - Not Permitted Under Statute
- Apply 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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STOLL KEENON OGDEN PLLC 

## PREPARING AN APPLICATION FOR 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

- 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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### SUGGESTED APPROACHES TO OBTAINING PSC APPROVAL

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### 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 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 FINANCED CONSTRUCTION PROJECTS

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### RURAL DEVELOPMENT FUNDING: LIMITED 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:  
LIMITED PSC REVIEW**

- Once Minimum Filing Requirements Met, PSC must take all actions necessary to implement RD Financing Agreement

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**RURAL DEVELOPMENT FUNDING:  
PSC CRITICISMS**

- Prevents PSC Review of Utility's financial condition and the technical aspects of project
- RD rates are generally inadequate, fail to allow for recovery of depreciation expense
- Water Utilities use RD-finance agreements to avoid PSC Review

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**DEBT AUTHORIZATION:  
THE BASICS**

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**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.**”

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**WHAT IS AN EVIDENCE OF INDEBTEDNESS?**

- Bonds
- Notes
- KIA Assistance Agreement
- Lease to Purchase Agreement
- Installment Contracts
- Letters of Credit

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**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

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**CONSEQUENCE OF NON-COMPLIANCE**

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

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STOLL KEENON OGDEN PLLC 

**PREPARING AN APPLICATION FOR DEBT AUTHORIZATION**

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**CONTENTS OF APPLICATION**

- Financial Exhibit
- Description of Applicant's Property
- Description of Use of Proceeds
- Detailed description of property to be acquired or constructed or proposed improvement
- Copy of contracts re: acquisition/construction of property, proposed improvement
- Notice to State Local Debt Officer

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### CONTENTS OF APPLICATION

- Maps/Plans of Property to be Acquired or Constructed
- Estimates of the Cost of Property/Improvements
- Application must be signed under oath by utility officer

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### APPLICANT MUST SHOW

- Issuance is for lawful object/purpose
- Issuance is necessary & appropriate for performance of utility's service to public
- Issuance will not impair utility's ability to serve public
- Issuance is reasonably & appropriate to perform service to public
- **Utility can meet debt service requirements**

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STOLL KEENON OGDEN PLLC 

### PROCEDURE

- Application
- Discovery
- Generally No Intervenors
- Hearing on Application Seldom Held
- Matter to Go to Front of PSC Docket
- Final Order: 60 Days from filing of Application but application may be continue beyond 60 days

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PLLC



# QUESTIONS?

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