

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

REQUEST TO FILL EXISTING VACANCIES ON)
THE BOARD OF COMMISSIONERS OF LETCHER) CASE NO. 2008-00395
COUNTY WATER AND SEWER COMMISSION)

ORDER

This case involves the request of Letcher County Judge/Executive Jim Ward for the Commission to fill three vacancies on Letcher County Water District's ("Letcher District") Board of Commissioners. By this Order, we accept the recommendations of Judge Ward and Letcher County Fiscal Court and appoint those nominees to fill the existing vacancies.

Letcher District, a water district organized in 1997 pursuant to KRS Chapter 74, owns and operates facilities that distribute water for compensation to approximately 951 customers in Letcher County, Kentucky.¹ As of December 31, 2007, Letcher District had total assets of \$10,960,244.² For the calendar year ending December 31, 2007, it

¹ *Annual Report of Letcher County Water and Sewer District (Water Division) to the Public Service Commission of Kentucky for the Year Ended December 31, 2007 ("Annual Report-Water")* at 4 and 21. See also Case No. 1996-00515, *Application for the Approval of the Letcher County Water and Sewer District* (Ky. PSC May 19, 1997).

² *Annual Report-Water* at 7.

had total operating revenues of \$508,278.³ Since 2001, Letcher District has provided sewer service to certain portions of Letcher County, Kentucky.⁴

A five-member board of commissioners administers Letcher District and has the statutory responsibility to “control and manage” the water district’s affairs.⁵ The Letcher County Judge/Executive appoints water district commissioners with the approval of Letcher County Fiscal Court.⁶ When Letcher District was formed in 1997, former Letcher County Judge/Executive Carroll Smith appointed, with the approval of Letcher County Fiscal Court, members to the Board. The terms of these initial appointees were initially staggered as required by statute.⁷

In 2008 Letcher County officials determined that County Judge/Executive Smith had apparently failed to document the appointment of members to Letcher District’s Board of Commissioners and had failed to submit successive appointments to Letcher County Fiscal Court for approval. These failures raised questions about the legal authority of certain commissioners to continue to serve. On September 15, 2008, at a meeting of Letcher County Fiscal Court, Letcher County Judge/Executive Ward declared that two vacancies existed.

³ *Id.* at 9.

⁴ *Annual Report of Letcher District, Sewer Division to the Public Service Commission of Kentucky for the Year Ended December 31, 2007* at 1. As of December 31, 2007, Letcher District’s sewer operations provided sewer service to 22 customers and had total assets of \$473,939. *Id.* at 2 and 12.

⁵ KRS 74.020(1).

⁶ KRS 74.020(1)(a).

⁷ See KRS 74.020(1)(a) (“Initial appointments shall be for terms of two (2), three (3), and four (4) years, as designated by the Court.”).

On September 23, 2008, County Judge/Executive Ward applied to the Commission to fill these vacancies.⁸ He and Letcher County Fiscal Court recommended that Phillip Back and Billy Stamper be appointed to fill the vacant positions.⁹ County Judge/Executive Ward's representative subsequently advised the Commission of the existence of a third vacancy and proposed that Richard Carter be appointed to fill that vacancy.

Pursuant to KRS 74.020(1)(a), a county judge/executive appoints water district commissioners with the approval of the county's fiscal court. KRS 74.020(4), however, provides that the Commission shall fill a vacancy on the board of commissioners "if, within ninety (90) days following the expiration of the term, the vacancy has not been filled by the appropriate county judge/executive with approval of the fiscal court."

The Commission finds that three vacancies currently exist on Letcher District's Board of Commissioners. Appendix A lists the past appointments to Letcher District's Board of Commissioners and the current vacancies. In the absence of any documentary evidence that the prior members were properly appointed and approved, we find that each of these vacancies has existed for longer than 90 days.

⁸ Judge Ward wrote the Commission to advise of the vacancies and to request Commission assistance in filling them. The Commission considers this letter as an application to make appointments to fill the vacancies.

⁹ Letcher County Fiscal Court Resolution No. 08-017. The same day, Jim Murtaugh, Letcher District's Operations Manager and Interim Executive Director, requested that the Commission appoint Seth Long and Donald Profitt to these vacant positions. The Commission has subsequently been advised that Messrs. Long and Profitt do not wish to be considered for the vacancies.

As the positions have been vacant for more than 90 days, the Commission has the statutory duty and the exclusive authority to fill them.¹⁰ While a county judge/executive and a county fiscal court may reach agreement on the vacant position, they lack authority to fill the vacancy once it has remained unfilled for more than 90 days. Any action on their part to appoint and approve a candidate at that time has limited legal effect and constitutes only a recommendation to the Commission.

Notwithstanding that appointment authority has been vested in the Commission in such circumstances, deference should be afforded to local officials. We have previously noted:

While the Commission has exclusive authority to fill vacancies that exist for 90 days or more, we will defer to the local elected officials in those instances where the local appointing and approval authorities have reached agreement on a candidate. Absent unusual circumstances that raise clear concerns about an agreed candidate's qualifications, such deference is appropriate because local officials generally have a better understanding of the candidates' qualifications and of the water district's needs and because these officials are directly accountable to the water district's customers through the ballot box.¹¹

¹⁰ KRS 74.020(4) provides:

Vacancies shall be filled by the same appointing authority which is empowered to make the original appointment. Vacancies resulting from cause other than expiration of the term shall be filled for the unexpired term only. Notwithstanding the provisions of KRS 67.710, a vacancy resulting from the expiration of a term shall be filled by the Public Service Commission if, within ninety (90) days following the expiration of the term, the vacancy has not been filled by the appropriate county judge/executive with approval of the fiscal court.

¹¹ Case No. 2007-00493, *Request for Assistance in the Appointment of Breathitt County Water District Commissioners* (Ky. PSC Mar. 20, 2008) at 4-5.

Based upon our review of the evidence of record, we find no information to suggest that any of the candidates are unqualified to serve in the designated position. We further find that each of the candidates resides within Letcher District's territory and possesses adequate education, business skills, and experience to perform the duties of water district commissioner and that each should be appointed and approved to fill the vacant position for the recommended term.

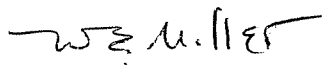
IT IS THEREFORE ORDERED that:

1. Richard Carter is appointed to fill the existing vacancy on Letcher District's Board of Commissioners. His term shall expire on June 30, 2012.
2. Billy Stamper is appointed to fill the existing vacancy on Letcher District's Board of Commissioners. His term shall expire on June 30, 2009.
3. Phillip Back is appointed to fill the existing vacancy on Letcher District's Board of Commissioners. His term shall expire on June 30, 2009.

Done at Frankfort, Kentucky, this 28th day of January, 2009.

By the Commission

ATTEST:


FOR JEFF DEROUEN, w/ PERMISSION
Executive Director

Case No. 2008-00395

APPENDIX A

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE
COMMISSION IN CASE NO. 2008-00395 DATED JANUARY 28, 2009

District 1 Seat: Initial Term – 4 years				
Appointee	Appointment Date	Term Ends	Service Ends	Notes
Jim McAuley	07/01/1997	06/30/2001		Initial Appointment
Jim McAuley	07/01/2001 ¹	06/30/2005	10/14/2003	Died in Office
Seth Long	01/15/2004 ¹	06/30/2005		Appointed to Replace McAuley;
Seth Long	07/01/2005	06/30/2009	9/15/2008 ²	Seat Declared Vacant
Phillip Back		06/30/2009		Nominee

District 2 Seat: Initial Term – 4 years				
Appointee	Appointment Date	Term Ends	Service Ends	Notes
Donald Profitt	07/01/1997	06/30/2001		Initial Appointment
Donald Profitt	07/01/2001 ¹	06/30/2005		
Donald Profitt	07/01/2005 ¹	06/30/2009	06/21/2008	Resigned
Phillip Back	06/22/2008	06/30/2009	11/09/2009	Resigned
Fred Webb	11/09/2008	06/30/2009		Current Officeholder

District 3 Seat: Initial Term – 3 years				
Appointee	Appointment Date	Term Ends	Service Ends	Notes
Jack Martin	07/01/1997	06/30/2000		Initial Appointment
Jack Martin	07/01/2000 ¹	06/30/2004		
Jack Martin	07/01/2004 ¹	06/30/2008	06/30/2007	Resigned
L.R. Buchanan	06/30/2007	06/30/2008		
L.R. Buchanan	07/01/2008 ³	06/30/2012		Awaiting Successor
Richard Carter		06/30/2012		Nominee

District 4 Seat: Initial Term – 2 years				
Appointee	Appointment Date	Term Ends	Service Ends	Notes
Bill Caudill	07/01/1997	06/30/1999	06/30/1997	Initial Appointment
Sherrill Slone	07/01/1999 ¹	06/30/2003		
Sherrill Slone	07/01/2003 ¹	06/30/2007	12/31/2005	Ceased Attending Board Meetings
Jim Flynn	01/01/2006 ¹	06/30/2007		
Jim Flynn	06/17/2007 ⁴	06/30/2011		Current Officeholder

District 5 Seat: Initial Term – 4 years				
Appointee	Appointment Date	Term Ends	Service Ends	Notes
Pat Gish	07/01/1997	06/30/2001	06/30/1997	Initial Appointment
Pat Gish	07/01/2001 ¹	06/30/2005		
Pat Gish	07/01/2005 ¹	06/30/2009	12/31/2007	Ceased Attending Meetings ⁵
Billy Stamper		06/30/2007		Nominee

Notes:

1 – No documentary evidence of appointment by Letcher County Judge/Executive or subsequent approval by Letcher County Fiscal Court

2 – Letcher County Judge/Executive declared seat vacant because of absence of evidence of proper appointment and approval of present officer holder.

3 – Office holder was not reappointed to a new term but continues to serve until a successor is lawfully appointed.

4 – Appointment for term beginning on July 1, 2007.

5 – According to Letcher County Attorney, Ms. Gish ceased attending board meetings at “some point in 2007.” The minutes of the meeting of Letcher County Fiscal Court for June 18, 2007 indicate that Chamer Craft was appointed and approved to succeed Ms. Gish. Based on the lack of any further reference to Mr. Craft in the record, it appears that Mr. Craft did not assume the office of water district commissioner.

Hon. Keith Adams
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Interim Executive Director
Letcher County Water and Sewer District, Water
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