Opinion No. 2013-085

December 10, 2013

The Honorable Robert Thompson
State Senator
414 West Court
Paragould, Arkansas 72450-4293

Dear Senator Thompson:

You have requested my opinion on two questions related to water and sewer utility service. You provide the following background information, which—for purposes of this opinion—I will assume to be correct:

> The Paragould Light & Water Commission (PLWC) exists by virtue of Act 562 of 1953[,] which is codified at A.C.A. § 14-201-201 et seq. The Paragould City Council adopted Ordinance 625 of 1953, which enacted Act 562. The control and right of operation of the water facilities of the City of Paragould has been vested by law in its City Council since 1967. In 1972, the Paragould City Council passed Ordinance 904 creating the Water and Sewer Commission of the City of Paragould. The City Council consolidated [this] Commission with the Light Plant Commission in Ordinance 84-7[,] adopted on March 30, 1984. Later that year, the City Council passed Ordinance 84-25 changing the name of the governing entity to the Paragould Light & Water Commission….
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> In [] approximately 1986, the City of Oak Grove Heights contracted with PLWC for the provision of water service…. [Citizens of Oak Grove Heights receive their water service from PLWC but their sewer service from the City of Oak Grove Heights.] Some customers of Oak Grove Heights' sewer service have become delinquent [on their payments].

> [When Act 1210 of 2013] was passed, it was asked whether PLWC could shut off the water service of delinquent customers of the City of Oak Grove Heights' sewer service without a hearing.

With this background in mind you ask two questions:

1. Is the Paragould Light & Water Commission (PLWC) a "corresponding water utility" as that term is defined in A.C.A. § 14-234-702(1)?

2. Does the mandatory termination of service [provision] contained in A.C.A. § 14-234-703(b) violate the U.S. Constitutional safeguards set forth in *Memphis Light v. Craft*, 436 U.S. 1 (1978)?

RESPONSE

In my opinion, based on the information you have provided, the answer to your first question is "yes." The answer to your second question is "no," because a given utility company could comply with A.C.A. § 14-234-703(b) and still meet its obligations as set forth in *Memphis Light v. Craft*.

DISCUSSION

Question 1: Is the Paragould Light & Water Commission (PLWC) a "corresponding water utility" as that term is defined in A.C.A. § 14-234-702(1)?

This question is essentially one of statutory interpretation, the main goal of which is to give effect to the legislature's intent. The first step to achieving that goal is to examine the ordinary meaning of the statute's wording. The statute must be read as a whole. No single word or phrase should be read in isolation from the surrounding words, phrases, and subparts. If possible that reading must be done in such a way that no word or phrase is left superfluous. If this reading indicates that the statute is ambiguous—which occurs when the statute is open to two or more plausible readings—only then do we resort to the rules of statutory construction. Under these rules, we assess (among other things) the

statute's amendatory history, language, subject matter, and statements of legislative intent.[1]

The statute to which we must apply these principles is section 14-234-702(1), which codifies Act 1210 of 2013 ("The Sewer Utility Collection Act"). Under this act, two elements must be met in order for an entity to be a "corresponding water utility":

> "Corresponding water utility" means an individual or entity that:
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> (A) **[Element 1]** Owns or operates in this state equipment or facilities for diverting, developing, pumping, impounding, distributing, or furnishing water to or for the public for compensation; **and**
>
> (B) **[Element 2]** Is not under common ownership with a sewer utility[.]

A "sewer utility" is further defined as "an … entity that maintains a sewage collection system or a sewage treatment plant, intercepting sewers, outfall sewers, force mains, pumping stations, ejector stations, and other appurtenances necessary or useful for the collection or treatment, purification, and disposal of liquid and solid waste, sewage, or wastewater."[2]

Your background information indicates that PLWC meets the first element. According to your background facts, the PLWC is the entity through and by which the City of Paragould furnishes water service to the citizens of Oak Grove Heights. Thus, the first element is met.

Thus, the question whether PLWC qualifies as a corresponding water utility turns on whether Element 2 is met. To assess that issue, we need to understand what it means to say the water utility "[i]s not under common ownership with a sewer utility." If this means *any* sewer utility at all, then PLWC would not be a "corresponding water utility" because PLWC owns both a water utility and a sewer utility.

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[1] *E.g., DaimlerChrysler Corp. v. Smelser*, 375 Ark. 216, 222, 289 S.W.3d 466, 472 (2008) (internal citations omitted).

[2] A.C.A. § 14-234-702(2).

But, in my opinion, that cannot be the correct reading of Element 2 because it reads the term "corresponding water utility" out of context. More specifically, such a reading fails to take into account how the term is used in the operative provision of the statutory scheme: section 14-234-703. When we look at that statute a "corresponding water utility" furnishes water to a customer who obtains sewer service from *an entirely separate entity*. This is evident from 14-234-703(b), which under certain specified circumstances requires a corresponding water utility to "terminate water service to a customer *of the sewer utility who is also a customer of the corresponding water utility*." In other words, the context of 14-234-703(b) makes it clear that the thing to which the "corresponding water utility" *corresponds* is a particular type of customer: one that is served by a sewer utility that does not control that customer's water service.

Accordingly, when the term "corresponding water utility" is read in context—which is essential to assessing a term's plain meaning—it becomes clear that an entity meets Element 2 if (*a*) the entity has a particular customer that is served by a sewer utility and (*b*) the entity and the sewer utility servicing that specific customer are not owned or controlled by the same person or organization.

With this understanding of Element 2, we can see that (based on the facts you have provided) PLWC ***is*** a corresponding water utility with respect to its customer base in the City of Oak Grove Heights. Thus, based on the facts as you have provided them, the answer to your question is "yes."

Question 2: Does the mandatory termination of service [provision] contained in A.C.A. § 14-234-703(b) violate the U.S. Constitutional safeguards set forth in Memphis Light v. Craft, 436 U.S. 1 (1978)?

Subsection 14-234-703(b) states:

> (b) A corresponding water utility shall terminate water service to a customer of the sewer utility who is also a customer of the corresponding water utility upon receiving written documentation from the sewer utility that the customer:
>
> (1) Has not paid for sewer utility service for more than twenty-five (25) days past the earliest due date shown on the face of the sewer utility bill;

> and
>
> (2) Has been sent notice via the United States Postal Service to an address provided by the customer that service will be terminated in no less than fifteen (15) days from the date of mailing if the balance due for sewer utility service and any applicable late fees are not paid.

You ask whether this statute somehow violates the U.S. constitutional safeguards set forth in *Memphis Light v. Craft*. In that case, the U.S. Supreme Court was asked whether a city-owned utility afforded its customer due process before it shut off the customer's utility service. In short, the utility was double billing Mr. and Mrs. Craft. Between October 1973 and January 1974, the Crafts repeatedly and unsuccessfully tried to resolve the double-billing issue. Yet, during that period, the utility cut off the Crafts' utility service five times for nonpayment. The Crafts sued.[3]

When the case reached the Court, it held that the continuation of utility service is a legitimate claim of entitlement protected by the Due Process Clause of the Fourteenth Amendment.[4] Next, the Court concluded that Due Process Clause requires the utility (1) to provide "notice informing the customer not only of the possibility of termination but also of a procedure for challenging a disputed bill," and (2) to have an established procedure for resolution of disputes or some specified avenue of relief for customers who dispute the existence of the liability."[5] Applying these standards, the Court held that the utility failed to provide the Crafts with their due process rights.[6]

As you can see from the foregoing recitation of *Memphis Light*, the case establishes principles that utilities must follow when terminating service for nonpayment. Nothing in A.C.A. § 14-234-703(b) prevents a utility from following the two main principles established in *Memphis Light*: namely, that the utility must notify customers of a procedure to challenge a disputed bill and that it must have an established procedure to

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[3] *Memphis Light v. Craft*, 436 U.S. 1 (1978).

[4] *Id*.

[5] *Id*. at 12 (internal quotations and brackets omitted).

[6] *Id*.

resolve such disputes. Thus, at least on its face, there is no reason to think that a utility could not comply with both A.C.A. § 14-234-703(b) and *Memphis Light*.[7]

Assistant Attorney General Ryan Owsley prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN MCDANIEL
Attorney General

DM:RO/cyh

[7] I am only addressing the question whether A.C.A. § 14-234-703(b) is somehow, on its face, inconsistent with *Memphis Light*. I will note, however, that given section 14-234-703's terms, it is not entirely clear whether it is the sewer or the water utility that is required to afford the customer the due process rights. Certainly, subsection 14-234-703(d)(2)(B)—which purports to exempt a corresponding water utility from "any liability" arising from compliance with this statute—will not shield the utility from a lawsuit based on the federal constitution. Clearly, it is in the best interests of all parties for the two utilities to agree upon some procedure that ensures customers are afforded their due process rights.