



OFFICE OF ATTORNEY GENERAL  
STATE OF OKLAHOMA

ATTORNEY GENERAL OPINION  
2018-2

The Honorable Julie Daniels  
Oklahoma State Senator, District 29  
2300 N. Lincoln Blvd., Room 531  
Oklahoma City, OK 73105

March 30, 2018

Dear Senator Daniels:

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following questions:

- 1. If a public entity that provides sewer or wastewater service (“sewer provider”) wishes to request that a public entity providing water service (“water provider”) terminate service to a common customer pursuant to 11 O.S.Supp.2017, § 22-112.5, what procedure must the sewer provider follow to request the termination of water service?**
- 2. Upon receiving a request to terminate service from a sewer provider pursuant to 11 O.S.Supp.2017, § 22-112.5, must the water provider give the customer notice and an opportunity to be heard before water service is terminated?**
- 3. Would a water provider that terminates service pursuant to 11 O.S.Supp.2017, § 22-112.5 incur any liability by terminating water service to a customer that is in good standing with the water provider?**

**I.  
BACKGROUND**

In Oklahoma, many municipalities provide water and sewer/wastewater services as a unified service to their residents, who receive a single bill for these services. *See, e.g., Sharp v. Hall*, 1947 OK 193, 181 P.2d 972. Other—typically small—municipalities may supply only sewer/wastewater service to their citizens, who connect to a neighboring—typically larger—municipality’s water supply. In this scenario, each municipality invoices the customer separately for service provided.

A municipality acting as both sewer provider and water provider has a simple solution when a resident fails to pay for these services when billed: termination of services until the delinquent account is brought into good standing. *See, e.g.*, 12 E. MCQUILLIN, LAW OF MUNICIPAL CORPORATIONS § 35.48 (3d ed. 2010) (“Termination of service is a reasonable remedy for nonpayment when invoked against a customer who contracted, either expressly or impliedly, to pay for the services.”). In non-unified systems, however, this remedy is available to the water provider, but may not be an option for the sewer provider. Indeed, terminating access to sewer/wastewater disposal to a customer that is receiving water service creates the potential for a public health hazard. *Cf. Sharp*, 1947 OK 193, ¶ 16, 181 P.2d at 680 (noting that a resident “purchasing the water service must, of necessity, use the sewer system to dispose of the water so purchased”).

In 2016, the Oklahoma Legislature enacted Senate Bill 1029 to offer public sewer providers a potential mode of recourse against customers who obtain water service from a different public entity.<sup>1</sup> *See* 2016 Okla. Sess. Laws c. 98. The legislation, now codified as Section 22-112.5 of Title 11, provides as follows:

- A. Where water service is provided to real property by one public entity but that property receives sewer or waste water service from another public entity, and where the sewer or waste water account for the property has been found to be delinquent as determined by the policies adopted by the public entity regarding nonpayment, the governing body of the public entity providing sewer or waste water service to that property may request that the public entity providing water service terminate water service. Until the delinquency has been resolved, the governing body of the public entity providing sewer or waste water service requesting the termination of water service shall provide a proposed date for termination and notice to the public entity providing water service, and to the account holder and property owner of the subject property at least thirty (30) days prior to the proposed date for termination. The public entity providing water service may terminate water service at the subject property on the proposed date for termination or within thirty (30) days thereafter. Should the sewer or waste water delinquency be resolved during the pendency of the termination of water service, or sometime thereafter, the public entity which requested termination of water service shall provide the public entity providing water service notice of the resolution of delinquency no later than the first business day following resolution.

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<sup>1</sup> While the statute broadly refers to “public entit[ies],” this issue appears to arise most frequently with regard to municipal providers, and is codified in Title 11 of the Oklahoma Statutes pertaining to Cities and Towns. Municipal powers are limited to those (1) expressly conferred by statute or charter, (2) impliedly granted and fairly incident to an express power; or (3) essential to the declared objects and purposes of the corporation. *Y & Y Cab Serv., Inc. v. City of Oklahoma City*, 1933 OK 547, ¶ 0, 28 P.2d 551. Rural water, sewage, and wastewater districts, as creatures of statute, are similarly limited regarding their powers. *See Rural Water Sewer and Solid Waste Mgmt. Dist. No. 1 v. City of Guthrie*, 2010 OK 51, ¶ 18, 253 P.3d 38, 46. *But see* The Interlocal Cooperation Act, 74 O.S.2011 & Supp.2017, §§ 1001–1008 (authorizing state agencies, political subdivisions, and other public entities—including nonprofit corporations formed for the purpose of developing and providing water and sewage disposal facilities to serve rural residents—to enter into agreements to jointly share powers, privileges or authority).

The public entity providing water service shall renew water service no later than the first business day following the notice. Should the sewer or waste water delinquency be resolved during the pendency of the termination of water service, or sometime thereafter, the public entity which requested termination of water service shall provide the account holder and the property owner notice of the resolution of the delinquency, upon request.

- B. Each public entity desiring to utilize the termination provision authorized in subsection A of this section shall enact, in accordance to law and as required by this act, notice and hearing procedures to ensure account holders and property owners receive adequate notice and opportunity for hearing prior to commencement of the procedures authorized in subsection A of this section.

11 O.S.Supp.2017, § 22-112.5. In short, the statute authorizes a sewer provider to request a water provider to terminate water service to a shared customer whose sewer/wastewater account is in arrears, but prior to making such a request the sewer provider must give notice to the account holder and to the property owner<sup>2</sup> and provide an opportunity to be heard. Upon receiving the request, the water provider is authorized, but not mandated, to terminate service on or after the date proposed by the sewer provider. While the mechanism of Section 22-112.5 is slightly different, the concept of authorizing a municipal utility provider to discontinue service based on the customer's failure to pay for an "interdependent" service—whether that service is provided by the same or a different entity—has generally been upheld, subject to due process considerations.<sup>3</sup>

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<sup>2</sup> The term "property owner" is a broad concept that may invoke the interests of multiple actors. *See In the Matter of Protest of Hare*, 2017 OK 60, ¶ 14, 398 P.3d 317, 321 ("Ownership is defined as '[t]he bundle of rights allowing one to use, manage, and enjoy property, including the right to convey it to others.'" (quoting BLACK'S LAW DICTIONARY (10<sup>th</sup> ed. 2014))). In all likelihood, notification of the owner of record based on county property records will suffice for the purposes of Section 22-112.5, but there may be cases in which such notice is deemed insufficient. *See, e.g., Luster v. Bank of Chelsea*, 1986 OK 74, ¶¶ 17-18, 730 P.2d 506, 509-10 (finding notice insufficient where it was sent to the incorrect person based on erroneous information in county tax rolls).

<sup>3</sup> *See City of Covington v. Sanitation Dist. No. 1 of Campbell and Kenton Ctys.*, 301 S.W.2d 885 (Ky. 1957) (upholding similar statute alleged to violate the "contracts clause" of the U.S. and Kentucky Constitutions and the "special laws" provision of the Kentucky Constitution), *Patterson v. City of Chattanooga*, 241 S.W.2d 291, 295 (Tenn. 1951) ("What is the difference between the discontinuing of the water for failure to pay [water bills as opposed to] the sewer charge? As far as we can see there can be no material difference because the sewer is a necessary incident to the use of water."), *Rash v. Louisville & Jefferson Cty. Metro. Sewer Dist.*, 217 S.W.2d 232, 238-39 (Ky. App. 1949) ("[W]e can see no reason why the Water Company under a contract with the Sewer Board may not discontinue its service to delinquent sewer users. The use of both services is interdependent."), *State v. City of Miami*, 27 So.2d 118, 126 (Fla. 1946) ("It appears to us that if no constitutional rights of the owner or occupant of premises are violated by shutting off the water for nonpayment of the water bill, no such right will be violated by shutting off the water for nonpayment of the bill for use of the sewage disposal system, the two services being so interlocked that neither can be effective without the other."). *See also* Ark. A.G. Opin. 2013-085 (opining as to due process considerations of Section 14-234-703(b) of the Arkansas Code, a statutory provision similar to Title 11, Section 22-112.5).

## II. DISCUSSION

### **A. To request a water provider to terminate service to a shared customer pursuant to Title 11, Section 22-112.5, a sewer provider must follow the procedures required for its governing board to take action.**

In your first question, you ask about the manner in which the sewer provider must go about requesting a water provider to terminate service under Section 22-112.5. There is nothing in the statute that dictates a particular method by which the sewer provider must make such a request. The only limitations are that the request must (i) come from “the governing body of the public entity providing sewer or waste water service,” after (ii) the sewer/wastewater account “has been found to be delinquent as determined by the policies adopted by the [sewer provider] regarding nonpayment[.]” 11 O.S.Supp.2017, § 22-112.5(A). Accordingly, before the sewer provider may make a request under Section 22-112.5, it must make a finding of delinquency pursuant to certain internal procedures.<sup>4</sup> Once such a finding has been made, the sewer provider must comply with the relevant statutes, charter provisions, and/or ordinances by which the specific type of body at issue is authorized to take action. In the case of a municipal sewer provider, such action would likely come in the form of a resolution. *See* 11 O.S.2011, § 1-102(12) (defining “resolution” as “a special or temporary act of a municipal governing body which is declaratory of the will or opinion of a municipality in a given matter and is in the nature of a ministerial or administrative act”).

Of course, the statute also provides certain substantive and procedural requirements that the sewer provider must satisfy in connection with making such a request. For instance, the sewer provider must also give notice of a proposed date for termination of water service to the water provider, the account holder, and the property owner, and such date must be at least 30 days after the notice is given. 11 O.S.Supp.2017, § 22-112.5(A). Thus, a sewer provider wishing to make a termination-of-service request to a water provider serving a common customer must make such a request (i) according to the requirements for the sewer provider’s governing body to take action, and (ii) consistent with any notice requirements set forth in Section 22-112.5(A).

### **B. A water provider must adopt procedures for terminating water service to a customer pursuant to a request made by a sewer provider under Title 11, Section 22-112.5.**

It is clear from the text of Section 22-112.5 that a sewer provider wishing to take advantage of the recourse provided therein must comply with the statutory procedures—as well as enact its own procedures—to ensure adequate notice to the account holder and property owner and an opportunity to be heard. Specifically, as alluded to above, Section 22-112.5(A) contemplates as a condition precedent of *requesting* termination of water service that a finding has been made that the sewer/wastewater account is delinquent, stating in part:

Where water service is provided to real property by one public entity but that

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<sup>4</sup> This requirement is discussed in more detail in Section II(B), *infra*.

property receives sewer or waste water service from another public entity, **and where the sewer or waste water account for the property has been found to be delinquent as determined by the policies adopted by the public entity regarding nonpayment**, the governing body of the public entity providing sewer or waste water service to that property may request that the public entity providing water service terminate water service.

11 O.S.Supp.2017, § 22-112.5(A) (emphasis added). Similarly, Section 22-112.5 requires that “[e]ach public entity desiring to utilize the termination provision authorized [therein] shall enact, in accordance to law and as required by this act, notice and hearing procedures to ensure account holders and property owners receive adequate notice and opportunity for hearing **prior to commencement of the procedures** authorized [therein].” *Id.* § 22-112.5(B) (emphasis added). Because only the sewer provider would be in a position to determine whether the account is delinquent, and such determination must be made **prior to** any service-termination request being made to the water provider, this requirement applies only to a sewer provider “desiring to utilize the termination provision authorized” in Section 22-112.5(A).

While a sewer provider is **statutorily** required to adopt and utilize notice and hearing procedures to determine an account holder’s delinquency, the water provider is not. Nevertheless, **constitutional** due process protections are implicated here because, in the absence of a sewer/wastewater account delinquency, the water provider is required to provide service.<sup>5</sup> *See Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12 (1978) (holding that because the utility was only permitted to terminate service for cause, the customers had “a ‘legitimate claim of entitlement’ [to continued service] within the protection of the Due Process Clause”); *see also id.* at 18 (noting that “[u]tility service is a necessity of modern life” and “discontinuance of water or heating for even short periods of time may threaten health and safety,” in determining the nature of process that a customer is entitled to before termination). And because it is the water provider that would terminate service, the water provider must adopt procedures<sup>6</sup> to ensure sufficient notice to the account holder and property owner and an opportunity to be heard. *See id.* at 18 (holding

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<sup>5</sup> Specifically, termination of water service is permitted under Section 22-112.5(A) only if the sewer/wastewater account is delinquent. If the delinquency is resolved after water service is terminated, the sewer provider **must** notify the water provider “no later than the first business day following resolution” and the water provider “**shall renew water service** no later than the first business day following the notice.” 11 O.S.Supp.2017, § 22-112.5(A) (emphasis added). It is also conceivable that municipal ordinances or policies of the water provider could independently create a protected interest in continued water service. *Cf. Midkiff v. Adams Cty. Reg’l Water Dist.*, 409 F.3d 758, 763 (6<sup>th</sup> Cir. 2005) (“Where a valid independent source of law establishing a property right may be found, the Supreme Court and the Sixth Circuit have indeed held that the Due Process Clause applies to termination of utility services.” (citations omitted)).

<sup>6</sup> The question of what procedures must be adopted cannot be answered in the abstract. For instance, for notice to be adequate it must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections.” *Shamblin v. Beasley*, 1998 OK 88, ¶ 13, 967 P.2d 1200, 1209. Accordingly, it is the totality of circumstances in each individual case that will determine if due process is satisfied. *Crownover v. Keel*, 2015 OK 35, ¶ 24, 357 P.3d 470, 477. *But see* 12 MCQUILLIN § 35.48 (“To be constitutionally sufficient the municipal utility’s shutoff procedures must, at a minimum, provide the customer with an opportunity to discuss his or her billing problem with designated personnel authorized by the utility to rectify errors in the customer’s billing.” (citing *Memphis Light*, 436 U.S. 1)).

that where a protected property interest is implicated, “some administrative procedure for entertaining customer complaints prior to termination is required to afford reasonable assurance against erroneous or arbitrary withholding of essential services”).<sup>7</sup>

**C. The water provider will not incur liability for terminating service pursuant to Title 11, Section 22-112.5 to a customer in good standing as long as it complies with the requirements set forth therein.**

Finally, you ask whether a water provider could incur civil liability if it terminates service under Section 22-112.5. With regard to contractual liability, if the water provider modifies its current terms of service to include as a reason for termination of service honoring proper requests made by a sewer provider under Section 22-112.5, termination upon such grounds would not constitute a breach of contract. Likewise, as described above, so long as the water provider satisfies the requirements of Section 22-112.5 and affords the account holder and property owner with adequate notice and an opportunity to be heard before terminating service, it will not be liable for violating their constitutional right to due process.

**It is, therefore, the official Opinion of the Attorney General that:**

- 1. To properly request a water provider to terminate service to real property pursuant to 11 O.S.Supp.2017, § 22-112.5, a sewer provider must follow the procedures required for its governing board to take action and comply with the statutory notice requirements set forth in Section 22-112.5.**
- 2. To satisfy constitutional due process requirements, a water provider that intends to terminate service pursuant to a request made under 11 O.S.Supp.2017, § 22-112.5 must provide the account holder and property owner adequate notice of termination and an opportunity to be heard before terminating service.**
- 3. If a water provider modifies its current terms of service to include as a reason for termination of service honoring proper requests made by a sewer provider under 11 O.S.Supp.2017, § 22-112.5, and provides the account holder and property owner adequate notice of termination and an opportunity to be heard, the water provider will not incur civil liability for terminating water service.**

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<sup>7</sup> Admittedly, putting this burden on the water provider is an awkward fit, as it likely would not be privy to the details of the sewer/wastewater account delinquency. However, there is nothing to prohibit the sewer provider and water provider from taking coordinated measures to minimize redundancy in, or even consolidate, their notice and hearing procedures. For instance, the providers could explore enacting joint procedures pursuant to the Interlocal Cooperation Act, which is designed in part “to permit local governmental units to make the most efficient use of their powers by enabling them to cooperate with other localities on a basis of mutual advantage[.]” 74 O.S.2011, § 1001.



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