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Office of the Undersecretary for Domestic Finance
Department of the Treasury
1500 Pennsylvania Ave. NW
Washington, DC 20220

Docket Number: TREAS-DO-2021-0008

**Docket Name: Coronavirus State and Local Fiscal Recovery Funds Interim Final Rule
Comments**

Dear Sir or Madam:

The Kentucky League of Cities (KLC) appreciates the opportunity to comment on the interim final rule for the Coronavirus Local Fiscal Recovery Fund (CLFRF) established under the American Rescue Plan Act (ARPA). KLC represents nearly 400 cities throughout the commonwealth, and the organization plays a vital role in representing the interests of over 2,500 elected municipal officials and 30,000 city employees. We urge Treasury to provide additional flexibility to local governments, clarify certain language, and reconsider provisions that overstep congressional intent.

Utility Revenue

Kentucky cities provide water, sewer, natural gas, and electric utility services to thousands of Kentuckians. Nearly half of Kentucky cities operate one or more utility systems in the commonwealth, and many of these small systems have little financial support from general governmental funds. For example, about 88% of Kentucky cities have a population of 8,000 or less while close to half of those cities operate one or more utility systems.¹ In Fiscal Year 2019 – the last full fiscal year prior to the pandemic – Kentucky utilities collected over \$1.44 billion in water, sewer, natural gas, and electric utility sales, which represents 30% of total revenues collected.² Many cities reported drops in utility sales and increased arrearages directly attributable to the pandemic.

On May 8, 2020, Kentucky Governor Andy Beshear suspended disconnections due to nonpayment by all entities that provide natural gas, water, wastewater, or electric utility services within the state. The order also required municipal utilities to waive late payment fees.³ Although the order did not remove an individual's obligation to pay for a utility service provided, arrearages increased substantially for many municipal systems. Without the ability to cut off utility services or charge late fees, municipal utilities had no enforcement options to receive payment. In Bardwell, population 673

¹ Kentucky League of Cities. *Today's Kentucky City: A Comprehensive Analysis of City Operations*, available at <https://www.klc.org/News/6984/Publications>

² Uniform Financial Information Reports (UFIRs), FY 2019.

³ Kentucky Executive Order 2020-323, May 8, 2020, <http://web.sos.ky.gov/execjournalimages/2020-MISC-2020-0323-267678.pdf>

in rural western Kentucky, their June 2020 arrearages amounted to nearly 10% of their typical monthly revenues. Their utility sales make up almost 60% of the city’s total revenues. Any reduction in utility revenues result in general fund support, drawing down reserves, and/or laying off employees.

The moratorium lasted through October 19, 2020, which represented over five months of a utility’s annual operations.⁴ Many cities continue to struggle with lagging utility revenue while their fixed costs – provision of services and ongoing debt obligations – do not provide utilities flexibility to address unanticipated revenue loss. Further, the American Rescue Plan states, in part, the following:

“(c) REQUIREMENTS.—

(1) USE OF FUNDS.—Subject to paragraph (2), and except as provided in paragraphs (3) and (4), a metropolitan city, nonentitlement unit of local government, or county shall only use the funds provided under a payment made under this section to cover costs incurred by the metropolitan city, nonentitlement unit of local government, or county, by December 31, 2024—

.....

(C) for the provision of government services to the extent of the reduction in revenue of such State, territory, or Tribal government due to the COVID–19 public health emergency relative to revenues collected in the most recent full fiscal year of the State, territory, or Tribal government prior to the emergency;”⁵

The law outlines the purpose of the Local Fiscal Recovery Fund is “to mitigate the fiscal effects stemming from the public health emergency with respect to the Coronavirus Disease (COVID–19).”⁶ Actions taken to respond to the pandemic by state executives who implemented a moratorium on utility cutoffs and penalties for nonpayment directly resulted in lost utility revenue.

Utility services should qualify as government services and be included in the revenue loss calculation for several reasons. First, as noted above, § 603(c)(1)(C) only references “revenues collected” in the prior fiscal year; it does not specify the types of revenue, such as taxes, user fees, rental payments, etc. Specifically, Treasury has created a definition for a term – “general revenue” – that does not exist in the Act. The rule interprets congressional intent that goes much further than the plain language of § 603(c)(1)(C), which merely references revenues collected by the government. Second, municipal utilities should qualify as a government service because they are provided by government employees to residents and businesses. Simply because a city has a separate account for an activity should not mean the activity gets rejected as a government service.

Congress purposefully chose to use the term “government services” instead of “general services” or “general fund”; the latter two would yield more restrictive interpretations than the former. In fact, the only item specifically forbidden by the Act for cities includes supplementary payments to pension systems.⁷ However, Treasury’s interim final rule disallows certain expenses as government

⁴ Kentucky Executive Order 2020-881, October 19, 2020, <http://web.sos.ky.gov/execjournalimages/2020-MISC-2020-0881-269974.pdf>

⁵ Sections 603(c), 603(c)(1)(C) of the Act.

⁶ Section 603(a) of the Act.

⁷ Section 603(c)(2) of the Act.

services because they “do not directly provide services or aid to citizens.”⁸ By its own standard, deposits into a local pension fund would not qualify as a “government service” because they are not directly providing aid to the public; however, because Congress specifically excluded additional pension payments from the Act, the Department must infer that these payments would otherwise qualify as a “government service.” To that end, Treasury must expand the definition of “government service” to include other functions, operations, and activities of local governments.

Municipal utilities serve and are accountable to the public. In 1936, the Kentucky General Assembly removed regulatory jurisdiction previously provided by the Public Service Commission (PSC).⁹ State courts have upheld that municipalities that provide water and sewer services do not need additional governmental oversight because they are governments.¹⁰ As included in the interim final rule, governmental entities have “less pressure to turn profits” and “a commitment to serving entire communities.”¹¹ They do so because of their essential government service.

Revenue Loss Calculation

Treasury’s revenue loss calculation does not consider increases in fees or taxes that local governments may have implemented to avoid massive shortfalls. Section 157B of the Kentucky Constitution requires cities to balance their budgets, and expenditures cannot exceed revenues. “Revenues” means “all income from every source, including unencumbered reserves carried over from the previous fiscal year.”¹² Because of this constitutional provision, Kentucky cities raised taxes and fees, drew down rainy-day funds, and cut expenditures. Treasury’s revenue loss calculation and general guidance does not incorporate any of these factors. The revenue loss calculation punishes cities that proactively sought to avoid budget shortfalls by increasing taxes or fees. For instance, the City of Georgetown, Kentucky, faced a significant budget shortfall and raised its insurance premium tax in 2021 from 5% to 8%.¹³ The higher rate will begin collecting during Fiscal Year 2022. That increase may total around \$1.8 million more tax revenue than previously collected. The new rate puts them above the average city rate, and city officials would not have taxed their rapidly growing population if not for the devastating budgetary impacts of COVID-19. As a result, the City of Georgetown will not qualify for the more flexible funding provided within the Act and the guidance. Many other cities raised taxes, increased fees, or renegotiated franchise agreements to address budget shortfalls. Like Georgetown, those cities may not have a revenue loss according to the Treasury, because they took action to avoid such a loss. KLC requests that Treasury clarify that cities that enacted new taxes or fees during either the base year or subsequent years be allowed to use alternative methods of determining revenue shortfalls that excludes this revenue.

Numerous Kentucky city officials also have expressed concern about the use of calendar year financial information instead of fiscal year data within the revenue loss calculation formula. Many Kentucky cities must conduct an annual audit of their fiscal year, which runs from July 1 through

⁸ Coronavirus State and Local Fiscal Recovery Funds. *Federal Register*, 86(93), p. 26801.

⁹ Kentucky Public Service Commission. *History*. <https://psc.ky.gov/Home/About#AbtComm>

¹⁰ Kentucky League of Cities. (2014). *Frequently Asked Questions Regarding the Kentucky Public Service Commission’s Regulation of Municipal Utilities*. <https://www.klc.org/UserFiles/files/PSCFrequentlyAskedQuestions.pdf>

¹¹ Coronavirus State and Local Fiscal Recovery Funds. *Federal Register*, 86(93), p. 26806.

¹² § 157B of the Kentucky Constitution.

¹³ City of Georgetown, Kentucky, Ordinance 2021-03.

June 30.¹⁴ The guidance states that cities must use their “actual revenue, which equals revenues collected over the past twelve months as of the calculation date.”¹⁵ While this time frame provides uniformity among all jurisdictions, it fails to incorporate audited figures. In fact, Treasury recommends that “recipients should use audited data if it is available” when calculating general revenue for the purposes of revenue replacement.¹⁶ Audited data will never be available on a calendar year basis, which the guidance requires for the purposes of the revenue loss calculation. Comparing fiscal year to fiscal year, instead of fiscal year to calendar year, would allow cities to use audited data to ensure accurate reporting to Treasury.

Broadband

A key component of the American Rescue Plan Act allows “necessary investments in water, sewer, or broadband infrastructure.”¹⁷ Treasury’s determination that unserved and underserved areas means the “lack (of) access to a wireline connection capable of reliably delivering at least minimum speeds of 25 Mbps download and 3 Mbps upload” severely restricts the ability of local governments to expand broadband access.¹⁸ According to the Federal Communications Commission (FCC), 94.3% of Kentucky’s population has fixed terrestrial 25 Mbps download and 3 Mbps upload broadband access, with 99.6% of the state’s urban population with that minimum access.¹⁹ While 68.8% of rural areas in the commonwealth have fixed 25Mbps/3 Mbps access²⁰, the KentuckyWired project – the long-delayed effort to expand fiber optic cable throughout the state – has constructed nearly 3,000 miles of “middle-mile” network to expand internet access.²¹ Many cities will not be able to use ARPA funding to connect to this infrastructure because much of the area may already have access to 25/3 speeds.

The COVID-19 pandemic forced nearly 650,000 public school students in Kentucky to operate on a full-time, emergency status of non-traditional instruction.²² This required students to have continual, reliable internet access, often when others in the home shifted to telework. The FCC notes that both a student and a telecommuter could use 5-25 Mbps individually.²³ Kentucky has an average household size of 2.5 people per residence, and nearly half a million households have children under 18 years old.²⁴ Over 1 million Kentuckians teleworked in March 2021 because of the pandemic, and

¹⁴ § 169 of the Kentucky Constitution and KRS 91A.040.

¹⁵ Coronavirus State and Local Fiscal Recovery Funds. *Federal Register*, 86(93), p. 26801.

¹⁶ Department of the Treasury. *Compliance and Reporting Guidance: State and Local Fiscal Recovery Funds*, June 17, 2021, p. 14.

¹⁷ Section 603(c)(1)(D) of the Act.

¹⁸ Coronavirus State and Local Fiscal Recovery Funds. *Federal Register*, 86(93), p. 26805.

¹⁹ Federal Communications Commission. *Fourteenth Broadband Deployment Report*, January 19, 2021. <https://docs.fcc.gov/public/attachments/FCC-21-18A1.pdf>

²⁰ *Ibid.*

²¹ Kentucky Communications Network Authority. *KentuckyWired Fiber Construction*, June 2021. <https://kentuckywired.ky.gov/Pages/index.aspx>

²² Kentucky Department of Education. *Non-Traditional Instruction*, April 27, 2021.

<https://education.ky.gov/school/innov/Pages/Non-Traditional-Instruction.aspx>

²³ Federal Communications Commission. *Broadband Speed Guide*,

<https://www.fcc.gov/consumers/guides/broadband-speed-guide>

²⁴ Census Bureau. *Households and Families, Table S1101*,

<https://data.census.gov/cedsci/table?q=household%20size&g=0400000US21&tid=ACSST1Y2019.S1101>

more than 630,000 still telework, three-quarters of which are doing so because of the pandemic.²⁵ These occurrences increase the demands on household internet service, requiring faster download and upload speeds. Based on similar household demands, the government of Canada set a goal of 50 Mbps download and 10 Mbps upload speeds for all residents as the minimum necessary to fully utilize the internet and related services.²⁶

The final rule should increase the threshold for “underserved” to encompass areas without 100/100 Mbps symmetrical service to align with modern broadband usage needs and patterns. Treasury should clarify that local governments have flexibility to determine if a location is “reliably” served, including whether residents can afford available service, whether network performance meets current needs, and whether end users report reliable service. Further, the final rule should clarify that if a jurisdiction lacks unserved or underserved areas, then the recipient may still use funds to support other broadband projects. Last, Treasury needs to allow recipients to create or upgrade wireless projects that provide free high-speed broadband access to unserved and underserved areas. The Kentucky Department of Education encouraged schools to create wireless mobile hotspots to provide internet service to all students during the pandemic, something that likely would not be necessary if local governments had funding invest in wireless service.²⁷

Incurred Expenditures and Obligations

The interim final rule creates ambiguity as to the time limits on using CLFRF money to pay for expenses related to COVID-19 response. Many of these expenses were incurred during calendar year 2020, but the interim final rule limits the use of CLFRF funds to costs incurred after March 3, 2021, a date that does not appear in the American Rescue Plan Act. Specifically, § 35.5(a) of the interim final rule states “[a] recipient may only use funds to cover costs incurred during the period beginning March 3, 2021, and ending December 31, 2024, for one or more of the purposes enumerated in sections 602(c)(1) and 603(c)(1)...”²⁸ § 35.5(b) goes on to define costs incurred as “[a] cost shall be considered to have been incurred for purposes of paragraph (a) of this section if the recipient has incurred an obligation with respect to such a cost by December 31, 2024.”²⁹ These dates seem to conflict with § 35.3 – which defines the COVID-19 public health emergency as “the period beginning on January 27, 2020 and until the termination of the national emergency concerning the COVID-19 outbreak declared pursuant to the National Emergencies Act.”³⁰ Kentucky cities seek clarification on whether ARPA funds can be used to cover costs described in § 35.6(b) of the interim final rule that were incurred by a city after January 27, 2020, but before March 3, 2021, consistent in § 35.3 and the Act. A simple fix could be to reference the definition of the COVID-19 public health emergency in § 35.6(b) of the final rule to clarify that CLFRF grants can be used to cover costs incurred during that period.

²⁵ Census Bureau. *Household Pulse Survey Data Tables*. <https://www.census.gov/programs-surveys/household-pulse-survey/data.html>

²⁶ Innovation, Science, and Economic Development Canada. *High-Speed Access for All: Canada’s Connectivity Strategy*, 2019. https://www.ic.gc.ca/eic/site/139.nsf/eng/h_00001.html

²⁷ Kentucky Department of Education. *Technology Support and Services for COVID-19*, 2021. <https://education.ky.gov/districts/tech/ksd/Pages/Technology-Support-and-Services-for-COVID-19.aspx>

²⁸ Coronavirus State and Local Fiscal Recovery Funds. *Federal Register*, 86(93), p. 26821.

²⁹ *Ibid.*

³⁰ Coronavirus State and Local Fiscal Recovery Funds. *Federal Register*, 86(93), p. 26819.

Additional confusion relates to the interpretation of the interim final rule’s definition of starting a project versus obligating the recipient. FAQ 4.7 states the following, in part, regarding investments in water, sewer, and broadband:

“Recipients may use Coronavirus State and Local Fiscal Recovery Funds to cover costs incurred for eligible projects planned or ***started prior to March 3, 2021***, provided that the project costs covered by the Coronavirus State and Local Fiscal Recovery Funds were incurred after March 3, 2021.”³¹ [Emphasis added.]

However, FAQ 6.12 states the following, in part, regarding investments in water, sewer, and broadband:

“All funds must be ***obligated within the statutory period between March 3, 2021 and December 31, 2024***, and expended to cover such obligations by December 31, 2026.”³² [Emphasis added.]

These two provisions appear to conflict. According to the Uniform Guidance, “obligations means orders placed for property and services, contracts and subawards made, and similar transactions during a given period that require payment by the non-Federal entity during the same or a future period.”³³ The interim final rule explicitly adopts the same meaning for “obligation” as defined by 2 CFR § 200.71. To start a project would necessarily obligate an entity to commit funds at a future point in time. Treasury appears to conclude that to start a project is synonymous with obligating funds in FAQ 6.2, which states in part:

“Treasury is interpreting the requirement that costs be incurred by December 31, 2024 to only require that recipients have ***obligated the funds by such date***. The period of performance will run until December 31, 2026, which will provide recipients a reasonable amount of time ***to complete projects*** funded with Fiscal Recovery Funds.”³⁴ [Emphasis added.]

Many recipients have started projects prior to March 3, 2021, but they continue to receive bills for work performed after that date. FAQ 4.7 says that they may use their ARPA funds to pay for the work incurred. However, FAQ 6.12 states that the funds must be obligated after March 3, 2021, and the definition of obligate includes placing orders or awarding contracts. Kentucky cities seek clarity in reconciling FAQs 4.7 and 6.12 regarding whether starting a project prior to March 3, 2021, constitutes an obligation of funds.

Transferability

The final rule should provide absolute clarity on the transferability of grant funds. The interim final rule explains that state and local governments can transfer funds to smaller or constituent local governments within their jurisdiction. It remains unclear if smaller or constituent local governments

³¹ Department of the Treasury. *Coronavirus State and Local Fiscal Recovery Funds: Frequently Asked Questions*, June 24, 2021. <https://home.treasury.gov/system/files/136/SLFRPFAQ.pdf>

³² Ibid.

³³ 2 CFR § 200.71.

³⁴ Department of the Treasury. *Coronavirus State and Local Fiscal Recovery Funds: Frequently Asked Questions*, June 24, 2021. <https://home.treasury.gov/system/files/136/SLFRPFAQ.pdf>

can transfer funds in the same manner to the larger units of government in which they reside. For the benefit of small units of local government with limited capacities to carry out expenditures under this category, the final rule should allow local governments to transfer grant dollars, and responsibility for those dollars, to a larger city, a county, or the state to carry out activities that benefit the residents of such small local governments. Among other things, such transfer authority would incentivize regional interventions in the housing market, the jobs market, etc.

The final rule should also expressly allow cities to transfer CLFRF money to other cities that provide a service within the transferer's community. For example, the City of Carrollton, Kentucky, provides wastewater service to the cities of Campbellsburg, Ghent, Glencoe, Prestonville, Sanders, Sparta, and Worthville.³⁵ Many of these city leaders have questioned whether they can provide any funding to the City of Carrollton for sewer projects in these smaller cities. KLC recommends Treasury incorporate plain language that communicates a transfer of grant funds between different local units of government is permitted whenever a grantee determines such transfers will result in eligible expenditures that benefit (but not necessarily exclusively benefit) the residents within the grantee's jurisdiction.

Conclusion

Thank you for the opportunity to submit comments on this urgent and groundbreaking program. We appreciate the Department's willingness to consider the concerns of Kentucky cities, and we look forward to additional clarifications in the weeks ahead. If you have any questions regarding our response, I encourage you to reach out to me at jchaney@klc.org or 859-977-3719 or to KLC Director of Public Affairs Bryanna Carroll at bcarroll@klc.org or 859-977-3793.

Sincerely,

J.D. Chaney
Executive Director/CEO

³⁵ Carrollton Utilities. *Wastewater*. Accessed July 12, 2021. <https://www.carrolltonutilities.com/m/main-menu/903>