



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL
FRANKFORT

ED W. HANCOCK
ATTORNEY GENERAL

December 16, 1975

Mr. Benjamin J. Lookofsky
Graves County Attorney
Courthouse
Mayfield, Kentucky 42066

OAG 75 7197

Dear Mr. Lookofsky:

You request our opinion as to whether a water district can refuse water service to individuals requesting it for houses constructed within the district. We assume you refer to a water district created under KRS Chapter 74.¹ Any such water district is, by virtue of KRS 278.015, a public utility and is subject to the regulatory control [rates and service] of the Public Service Commission in the same manner and to the same extent as any other utility as defined in KRS 278.010.

KRS 278.170(1) reads:

"(1) No utility shall, as to rates or service, give any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage, or establish or maintain any unreasonable difference between localities or between classes

1. Such a district is a political subdivision. Louisville Extension Water Dist. v. Diehl Pump & Supply Co., Ky., 246 S.W.2d 585 (1952).

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of service for doing a like and contemporaneous service under the same or substantially the same conditions."

The general rule is stated in 12 McQuillin, Municipal Corporations (1970) § 34.89, p. 211:

"It is universally held that a public service company, or a municipality which performs the duties of a public service company, insofar as the services requested are reasonably within its range of performance, must furnish a supply or service to any applicant within the prescribed territory * * * and cannot unjustly discriminate between patrons." (Emphasis added).

"The view has been expressed that a municipality distributing water to its inhabitants is under a duty to supply water to all the inhabitants of the community who apply for the service and tender the usual rates. . ." Ibid., § 35.35e, p. 471.

Judge Cullen, in City of Bardstown v. Louisville Gas & Electric Co., Ky., 383 S.W.2d 918 (1964) p.p. 921-922, wrote this as to the Kentucky rule of service responsibility:

"Subject to the qualification hereinafter stated, our view also is consistent with the proposition supported by a number of authorities that the scope or area of service obligation of a public utility is limited to the extent of its profession, holding out or dedication of service. See State ex rel. Ozark Power & Water Co. v. Public Service Commission, 287 Mo. 522, 229 S.W. 782; California Water & Telephone Co. v. Public Utilities Commission, 51 Cal.2d 478, 334

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P.2d 887; 43 Am.Jur., Public Utilities and Services, Sec. 22, pp. 586-588. The qualification is that under our view the scope or area of profession, holding out or dedication is fixed, not by what the utility actually chooses to do, but by the terms of the certificate of convenience and necessity."

However, the certificate of convenience must be examined together with the district's documents as to the geographical territory to be served. See KRS 74.010 as to territory to be included in a water district, and the county court's role in determining the service area boundaries. See also KRS 74.012 as to the Public Service Commission's role in determining necessity for a water district and the geographical area sought to be served.

"The primary duty of a public utility is to serve on reasonable terms all those who desire the service it renders; and it may not choose to serve only the portion of the territory covered by its franchise which is presently profitable for it to serve." 64 Am.Jur.2d, Public Utilities, § 16, p. 562. See also Southern Union Gas Co. v. New Mexico Pub. Serv. Com'n, 84 N.M. 330, 503 P.2d 310 (1972).

It has been held that the extent of service which a public utility has professed to give is a question of fact and not of law. Utah Power & Light Co. v. Public Service Commission, Utah, 249 P.2d 951 (1952); and Town of Beloit v. Public Service Comm., 34 Wis.2d 145, 148 N.W.2d 661 (1967).

The Supreme Court of Wisconsin in Town of Beloit, above, was of the opinion that the scope of the undertaking of the utility could be determined by a profession of services in a number of ways including contracts, maps, tariffs filed with state agencies or from the conduct and practices of the utility with or without regard to existing maps. However, the Kentucky Court of Appeals has narrowed the scope of service obligation to the extent of its profession or holding out, as fixed by the terms of the certificate of convenience and necessity. City of Bardstown, above, p. 922.

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See KRS 278.020 as to certificate of convenience and necessity.

It must be noted that the right to demand or receive utility service does not rise to the level of a constitutional right or entitlement from the state. See Jackson v. Metropolitan Edison Company, (U.S.C.A. -3, 1973) 483 F.2d 754. This decision was affirmed by the Supreme Court at 42 L.Ed.2d 477 (1974).

The answer to your question is that the water district is under an obligation to serve all inhabitants, including the subject applicant, within its geographical area of service as fixed under KRS 74.010 and as defined by the certificate of convenience and necessity. This is subject to the condition that applicant tender the usual rates and comply with the usual contractual terms as a user and with reasonable rules and regulations of the district.

Your second question is whether the water district is under a duty to borrow money to implement service to the subject applicant.

Some jurisdictions have held that a public service company is under a duty to furnish to all persons applying therefor the service which it offers without discrimination and at reasonable rates, where the service requested is within the reasonable range of its plant, equipment, lines or mains. See Homeowner's Loan Corp. v. Mayor and City Council, Md., 3 A.2d 747 (1939). However, the Kentucky rule does not follow that holding precisely.

While the Kentucky Court of Appeals has recognized that ordinarily a mandamus or mandatory injunction will lie at the instance of a consumer to compel a water company to extend its mains to any part of the city where its franchise requires it to operate, there are limitations on that principle. The right to such relief is not absolute, "and the relief may be denied where the demand is wholly unreasonable, in view of the peculiar hardships and disastrous consequences that would follow." Mountain Water Co. v. May, 192 Ky. 13, 231 S.W. 908 (1921); and Moore v. City Council of Harrodsburg, Ky., 105 S.W. 926 (1907). Thus, in the absence of fraud, corruption, or arbitrary action, the judgment

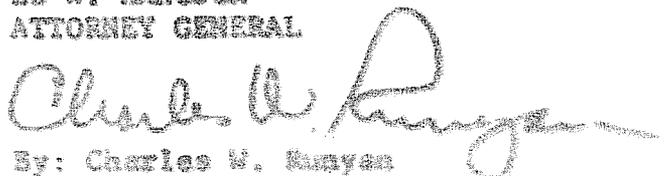
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of the Board of Commissioners of the water district as to the general management of the affairs of the district is beyond judicial control. See KRS 74.100 as to extensions of mains of a water district.

Thus it is our opinion that the commissioners of the district exercise a discretionary function in deciding whether or not to extend its system to an entirely new section within its certificated area. The courts or the Public Service Commission would not, we believe, turn them around as to its decision, except where abuse of discretion or arbitrary or fraudulent action is shown. The reasonableness of the board's action can be measured in terms of the certificated area, the new area to be served, the need and cost of such extension, the financial impact [including return in revenue] of the extension upon the public service company, and the impact upon the total service available to the general public of the certificated area. The interest of a few must be carefully weighed against the interest of the general public in the certificated area of service. Of course the district must treat all applicants similarly situate alike. *Johnson v. Reasor*, Ky., 392 S.W.2d 54 (1965) 56. This calls for adherence to any fixed standards. See annotation at 48 ALR 2d 1222, § 3; and 64 Am.Jur.2d, Public Utilities, § § 43, 44, and 238. The reasonableness of such proposed extension would involve largely many factual elements which could be initially determined upon complaint [where the service is refused] under KRS 278.260 and upon a formal hearing by the Public Service Commission pursuant to KRS 278.280. The commission's action is subject to court review under KRS 278.410 and final appeal to Court of Appeals [KRS 278.450].

Sincerely,

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ATTORNEY GENERAL



By: Charles W. Ryan
Assistant Deputy Attorney General