

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION**



CIVIL ACTION NO. 4:00CV-3-M

**PEGGY KETTERER, EDWIN NICHOLS
JOHN TOMES and THE GRAYSON
COUNTY WATER DISTRICT**

PLAINTIFFS

VS.

**THE CITY OF LEITCHFIELD AND
THE LEITCHFIELD UTILITIES COMMISSION**

DEFENDANTS

MEMORANDUM OPINION AND ORDER

This matter is before the Court upon a motion by the Plaintiffs, Peggy Ketterer, Edwin Nichols, John Tomes and the Grayson County Water District, for summary judgment [DN 10]. The Plaintiffs brought this lawsuit seeking declaratory judgment and injunctive relief to prevent the Defendants, City of Leitchfield and Leitchfield Utilities Commission, from invading or curtailing the service territory of the Grayson County Water District in violation of 7 U.S.C. § 1926(b), KRS 96.045, and KRS 96.150. Fully briefed, this matter is ripe for decision. For the reasons set forth below, the Plaintiffs' motion for summary judgment is granted in part and denied in part.

I. STANDARD OF REVIEW

In order to grant a motion for summary judgment, the Court must find that the pleadings, together with the depositions, interrogatories and affidavits, establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. The moving party bears the initial burden of specifying the basis for its motion and of identifying that portion of the record which demonstrates the

absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Once the moving party satisfies this burden, the non-moving party thereafter must produce specific facts demonstrating a genuine issue of fact for trial. Anderson v Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).

Although the Court must review the evidence in the light most favorable to the non-moving party, the non-moving party is required to do more than simply show that there is some "metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The rule requires the nonmoving party to present "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e) (emphasis added).

II. STATEMENT OF FACTS

The Plaintiffs allege that the City of Leitchfield and the Leitchfield Utilities Commission is threatening to intrude into the Grayson County Water District's service territory for the purpose of providing water service to a new regional detention center.

Grayson County Water District [hereinafter Water District] is a public water district created in the 1970s which operates a water distribution system in Grayson County. The Water District purchases its water from the City for distribution and resale to Water District customers. Included within the service territory of the Water District is the parcel of land which is the site of a new regional detention center presently under construction. The detention center is being built by the Grayson County Fiscal Court on land located on Shaw's Station Road. The site was annexed into the City's corporate limits in April of 1988. Currently, the Water District has an 8-inch water main located on this site. The water main is part of the original construction of the Water District's transmission and distribution system and was in place when the land was annexed into the City's corporate limits in April

of 1988.

In the Fall of 1999, the Fiscal Court inquired as to whether the City of Leitchfield would be willing to supply water to the new detention center. The City responded by letter dated December 6, 1999, that "if the Grayson County Water District cannot economically and feasibly provide your water needs, the City of Leitchfield/Utilities Commission will be happy to provide this service."

On December 10, 1999, the Fiscal Court formally requested the Water District to "inform the Court of [the Grayson County Water District's] ability to meet the needs of the project without additional cost . . . other than normal water rates . . ." In response, on December 20, 1999, the Grayson County Water District advised the Fiscal Court that the 8-inch water main already on Site "has the capacity to provide domestic service to fully meet the specifications . . . for the new jail." The Water District also informed the Fiscal Court that the existing water line would not meet the specifications for the fire protection requirements and the Water District would be required to construct a new 250,000 gallon storage tank on the site. The new tank is scheduled to be completed and in service by January 2001. The new construction would not require the detention center to make any capital contribution toward the construction.

On December 21, 1999, the Fiscal Court voted to obtain water for the Detention Center from the City. The Fiscal Court filed an application for the service with the City, but on January 13, 2000, the City responded that it could not comply with the Fiscal Court's request because of the pending lawsuit.

Plaintiffs filed this action seeking both declaratory and injunctive relief against the Defendants for the alleged curtailment of the Water District's service territory in violation of 7 U.S.C. § 1926(b).

III. DISCUSSION

In its motion for summary judgment, the Grayson County Water District seeks a declaration from the Court that it is entitled to the protections of 7 U.S.C. § 1926(b). Title 7 U.S.C. § 1926(b) provides in part:

The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan . . .

This provision was included in the Consolidated Farm and Rural Development Act, 7 U.S.C. § 1921 *et seq.*, “[i]n order to encourage rural water development by expanding the number of potential users and to safeguard the financial viability of rural associations and Farmers Home Administration loans.” Lexington-South Elkhorn Water Dist. v. Wilmore, 93 F.3d 230, 233 (6th Cir. 1996). “Before a party can prevail on such a claim, . . . it must show that it is entitled to Section 1926(b) protection by establishing that: (1) it is an ‘association’ within the meaning of the Act; (2) it has a qualifying outstanding Farmers Home Administration loan obligation; and (3) it has provided or made service available in the disputed area.” *Id.* at 234.

There appears to be no dispute that Grayson County Water District is an “association” within the meaning of 7 U.S.C. § 1926(b). The Water District is “a body politic created for the purpose of providing a public water supply to a designated geographic area,” and is therefore an “association” under this Act. Lexington-South Elkhorn Water Dist., 93 F.3d at 234. Additionally, the City agrees that the Grayson County Water District is a water association which is indebted to the USDA. The Court concludes that the Grayson County Water District satisfies two of the three requirements for protection under § 1926(b). Thus, the central issue in determining whether the Water District is entitled to protection under §

1926(b) is whether the Water District has provided service or has made service available within the disputed territories.

A. Provided or Made Service Available

"[W]hether an association has made service available is determined based on the existence of facilities on, or in the proximity of, the location to be served." Lexington-South Elkhorn, 93 F.3d at 237. "If an association does not already have service in existence, water lines must either be within or adjacent to the property claimed to be protected by Section 1926(b) prior to the time an allegedly encroaching association begins providing service in order to be eligible for Section 1926(b) protection." Id.

The Grayson County Water District argues that it is entitled to the protection of § 1926(b) because it has provided or made service available to the area in question by the presence of its 8-inch water main on the site and two decades of service to customers adjacent to the site. The City raises four arguments in opposition to the Water District's claim of entitlement to § 1926(b) protection. The City asserts that the Water District has not provided or made service available because: (1) the Water District's 8-inch water main located at the site is insufficient to supply the water requirements of the detention center; (2) the Water District does not have the ability to provide an adequate level of water for fire protection; (3) the Water District has failed to apply for a certificate of convenience and necessity to supply the drinking water to the detention center; and (4) the intended service to the detention center would exceed the Water District's maximum water purchase limit set forth by contract with the City of Leitchfield. These arguments shall be addressed in turn.

1. Sufficiency of 8-inch water main

Defendants argue that the Grayson County Water District has not provided or made service available to the detention center because the Water District's 8-inch water main

located on the site is inadequate to supply the water requirements of the detention center.

The record reflects that the Water District currently has an 8-inch water main located on the site. From the 8-inch water main, the Water District provides domestic drinking water service to a number of customers located adjacent to and in the vicinity of the site. According to the affidavit of Kevin Shaw, Systems Coordinator for Grayson County Water District, "[t]he 8-inch water main . . . is sufficient to satisfy the potable water requirements for the Detention Center." (February 11, 2000 Kevin Shaw Affidavit at ¶ 34). The Defendants have set forth no evidence to contradict Shaw's assertion that the Water District's existing 8-inch water main is capable of providing potable domestic drinking water to the detention center. Instead, the March 8, 2000 affidavit of the Defendants' expert, Sam McIlwain, addresses the sufficiency of the Water District's system to meet both the fire protection and drinking water needs of the detention center, not just solely the detention center's drinking water needs.¹ Therefore, the Court finds that no genuine issues of material fact exist concerning whether the Water District's 8-inch water main is sufficient to supply potable drinking water to the detention center.

Moreover, the adequacy of the water service the Water District is presently able to provide is irrelevant to a determination of whether the Water District is entitled to the protections of § 1926(b). North Shelby Water Co. v. Shelbyville Municipal Water and Sewer Commission, 803 F. Supp. 15, 23 (E.D. Ky. 1992). Instead, it is a decision entrusted to the appropriate state and local regulatory agencies. Id. As discussed by the district court in North Shelby,

Resolution of questions as to the adequacy of water service to be provided is within the exclusive jurisdiction of the appropriate regulatory agencies, which

¹For the reasons set forth in the next section, the Court focuses solely on the ability of the Water District to provide drinking water to the detention center.

in this case would include the PSC, and the local Planning and Zoning Commission. If [the water district] is incapable of providing the required level of service, the appropriate regulatory agencies are authorized to refuse to permit [the water district] to service those areas. 7 U.S.C. § 1926(b) was not intended to make federal courts into regulatory agencies for rural water systems.

803 F. Supp. at 23. Therefore, if questions of fact did exist concerning the ability of the 8-inch water main to provide drinking water to the detention center, it would be a question within the "exclusive jurisdiction" of the appropriate regulatory agencies, not this Court. *Id.*

2. Fire Protection

The main argument submitted by the City to refute the Water District's claim of § 1926(b) protection is that the Water District has not in fact made water service available to the detention center because it does not have the present capacity to provide an adequate level of water for fire protection. According to Defendants, in order to meet the detention center's fire protection requirements, the Water District will have to undertake a year long project to construct a 250,000 gallon water tower at an expense of \$600,000. Defendants maintain that the detention center needs the water service for the fire protection immediately in order to design its fire protection system. Therefore, Defendants argue that the Water District does not have the present capacity to provide an adequate level of water for fire protection and is not entitled to protection under § 1926(b).

This argument must be rejected. It is clear from the case law that an association's capacity to provide fire protection is not germane to the determination of whether 7 U.S.C. § 1926(b) protection is available to that association. "The adequacy of the water service [a water district] is presently able to provide, including fire protection, is irrelevant to a determination whether [a water district] is entitled to the protections of § 1926(b)." North Shelby, 803 F. Supp. at 23 (emphasis added). See also Rural Water System No. 1 v. City

of Sioux Center, Iowa, 29 F. Supp. 2d 975, 993-94 (N.D. Iowa 1998), aff'd in part, rev'd in part, 202 F.3d 1035 (8th Cir. 2000) ("To put it quite bluntly, 'fire protection' is a red herring." Id. at 993.); Rural Water District No. 3 v. Owasso Utilities Authority, 530 F. Supp. 818, 823 (N.D. Okla 1979) ("The court finds that § 1926(b) . . . was not enacted for the purposes of fire protection . . ." Id. at 823.). Therefore, the ability of the Water District to provide fire protection to the detention center is irrelevant to a determination of whether Grayson County Water District is entitled to the protection of § 1926(b).

3. *Failure to apply for a Certificate of Convenience and Necessity*

Defendants argue that the Grayson County Water District is required to apply for a certificate of convenience and necessity in order to supply the potable drinking water to the detention center. Because of this failure, Defendants argue that the Water District has failed to make service available pursuant to § 1926(b).

The Court disagrees. KRS 278.020 provides in relevant part that

No person, partnership, public or private corporation, or combination thereof shall commence providing utility service to or for the public or begin the construction of any plant, equipment, property, or facility for furnishing to the public any of the services enumerated in KRS 278.010, except retail electric suppliers for service connections to electric-consuming facilities located within its certified territory and ordinary extensions of existing systems in the usual course of business, until that person has obtained from the Public Service Commission a certificate that public convenience and necessity require the service or construction.

KRS 278.020(1). This statute provides for two exceptions from the certificate of convenience and necessity requirement: retail service connections and ordinary course of business extensions. Duerson v. East Kentucky Power Cooperative, Inc., 843 S.W.2d 340, 342 (Ky. App. 1992). "In an effort to comply with the statute, the commission has adopted a regulation defining extensions in the ordinary course of business." Id. Pursuant to 807

KAR 5:001 § 9(3),

Extensions in the ordinary course of business. No certificate of public convenience and necessity will be required for extensions that do not create wasteful duplication of plant, equipment, property or facilities, or conflict with the existing certificates or service of other utilities operating in the same area and under the jurisdiction of the commission that are in the general area in which the utility renders service or contiguous thereto, and that do not involve sufficient capital outlay to materially affect the existing financial condition of the utility involved, or will not result in increased charges to its customers.

The evidence reflects that the extension of service to the detention center from the Water District's 8-inch line is an extension in the ordinary course of business and, therefore, pursuant to the statute, does not require a certificate of convenience and necessity. For the reasons previously discussed, the Court expresses no opinion on whether a certificate of public convenience and necessity will be required to build the proposed storage tank and upgrade the system to support the storage tank in preparation to meet the fire protection requirements.

4. Contractual Limitation on Amount of Water

Defendants argue that the Water District has no legal right to provide service because its intended service to the detention center would exceed its maximum water purchase limit set by contract with the City of Leitchfield. According to the Defendants, the estimated water consumption of the proposed detention center is 1,100,000 gallons per month, the Water District's current peak monthly usage is 24,406,400 gallons (September, 1999), and an estimated 1.4 million gallons per month is needed for an ongoing construction project slated to be finished soon. Defendants state that the Water District by letter dated October 16, 1998 notified the City of an increased water need for the year 2000. The Water District requested peak monthly water needs of only 26,214,000 gallons per month. The City maintains that this requested amount is the maximum quantity it must provide under the contract, that this

quantity is insufficient to supply the estimated need for all the projects; and therefore, Defendants contend that Plaintiffs are legally unable to supply the necessary water to the detention center.

The Court disagrees. Under the current water purchase agreement, the Grayson County Water District is entitled to purchase, and the City of Leitchfield is obligated to provide, a maximum quantity of 25,000,000 gallons per month, or 950,000 gallons per day, of potable water. The water purchase agreement provides for increased demands in Paragraph 9 which reads as follows:

When the DISTRICT's total projections of water needs from the CITY approach the levels set forth in Paragraph 8 above, the DISTRICT shall provide notice to the CITY that additional quantities will be needed in approximately two (2) years. The CITY shall then immediately commence the construction required to provide the DISTRICT up to 41,000,000 gallons per month, not exceed 1,560,000 gallons per day on a daily rate basis, and shall complete such construction within two (2) years of said notice. Regardless of actions taken by the CITY related to water system construction, two (2) years after receiving said notice the City shall furnish the DISTRICT such quantities of potable water as may be required by the DISTRICT, except such quantities shall not exceed the greater of 41,000,000 gallons per month or 1,560,000 gallons per day on a daily rate basis. At such time as the actual additional debt service needed to provide the 41,000,000 gallons per month is established, a new rate shall be computed as generally set forth in paragraph 4 hereinbefore.

Second Supplemental Agreement ¶ 9. The Water District's October 16, 1998 letter notified the City of increased water demands which triggered the City's obligation under Paragraph 9 to complete construction within two years of facilities sufficient to provide the Water District up to 41,000,000 gallons of water per month. The attached sheet reflecting a need of 26,214,000 gallons per month by the year 2000 served only as an estimate or projection of water needs. It did not serve to modify the City's obligation under Paragraph 9.

The City's interpretation of the water purchase agreement would require notice and a two year delay each time the Water District experienced increased demand. The more reasonable approach to the anticipated growth of the Water District's needs is that which the parties clearly set out in Paragraph 9. Once the Water District serves notice on the City of increased demand over 25,000,000 gallons per month, the City has two years to equip itself to furnish the increased demand up to a maximum of 41,000,000 gallons per month. The Water District's needs obviously will not jump from 25,000,000 gallons per month to 41,000,000 gallons per month overnight, but the contract requires the City to ready itself for the increased demand, as it comes over time. Therefore, the Water District's intended service to the detention center will not exceed the Water District's maximum water purchase limit.

For the reasons set forth above, the Court concludes that the Grayson County Water District has provided or made service available in the disputed area pursuant to 7 U.S.C. § 1926(b) and is entitled to § 1926(b) protection.

B. Curtailment

The Plaintiffs have established that the Grayson County Water District is entitled to protection under 7 U.S.C. § 1926(b). Therefore, the question before the Court is whether the City has violated § 1926(b) by the curtailment or limitation of the Water District's service territory within the meaning of the statute. Curtailment includes the physical intrusion into the service territory of a federally-indebted water association by the pipes, lines, or equipment of a competing municipal water provider. Jennings Water, Inc. v. City of North Vernon, 895 F.2d 311 (7th 1989).

Plaintiffs maintain that the City and the Commission, by their actions or threatened actions, have unlawfully curtailed or limited the service territory of the Grayson County

Water District. Plaintiffs argue that the City's proposed construction of water lines and other facilities for the purpose of providing water service to the detention center plainly place them in violation of 7 U.S.C. § 1926(b).

The Court disagrees. The City has consistently taken the position that it would provide the needed service only if the Water District could not provide the service. The City has not built any pipes, lines, or equipment. In fact, the Court finds that curtailment or limitation of the service territory of the Water District by the City is not even threatened. By letter dated January 13, 2000, Kevin Pharis, Chairman of Leitchfield Utilities Commission, declined the Fiscal Court's request for water service stating that "[t]he Grayson County Water District now states that it can provide you the required service. Therefore, we can only wait and see whether or not they in fact can provide this service to you."

While the Grayson County Water District is entitled to the protections of § 1926(b), the Water District is not entitled to injunctive relief at the present time because the City has done nothing to curtail or limit the service territory of Grayson County Water District. If these facts change, the Water District can reopen this case for the purpose of seeking injunctive relief. It should be understood that the City may provide fire protection to the detention center without running afoul of § 1926(b).

C. State Claims

Similarly, for the reasons set forth above, the Court finds that no violation or threatened violation of KRS 96.045 or KRS 96.150 has occurred.

IV. CONCLUSION

The Court being sufficiently advised, **IT IS HEREBY ORDERED** as follows:

1. The motion by Plaintiffs for summary judgment [DN 10] is granted in part and denied in part.

2. The Grayson County Water District is (1) an "association" within the meaning of the 7 U.S.C. § 1926(b); (2) it has a qualifying outstanding Farmers Home Administration loan obligation; and (3) it has provided or made service available in the disputed area.

3. The motion by Plaintiffs for injunctive relief is denied. There has been no curtailment or limitation, whether actual or threatened, of Grayson County Water District's service area by the Defendants. Similarly, no violation or threatened violation of KRS 96.045 or KRS 96.150 has occurred.

4. This matter is stricken from the active docket.

THIS IS A FINAL AND APPEALABLE ORDER. THERE IS NO JUST CAUSE FOR DELAY.

This the 24th day of May, 2000.

Joseph H. McKinley, Jr.
Joseph H. McKinley, Jr.
Judge, United States District Court

cc: counsel of record

ENTERED
MAY 24 2000
JEFFREYA APPERSON, CLERK
BY *[Signature]*
DEPUTY CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT OWENSBORO
CIVIL ACTION NO. 4:00CV-3-M

PEGGY KETTERER, EDWIN NICHOLS,
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WATER DISTRICT

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DEFENDANTS

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDATION

BACKGROUND

Before the Court is the plaintiff's motion for the award of attorney's fees and other expenses pursuant to 42 U.S.C. Section 1988 (DN 18), defendants' objection (DN 19, 22) and plaintiffs' reply (DN 21). This matter was referred to the undersigned United States Magistrate Judge (DN 24) for submission of Findings of Fact, Conclusions of Law and Recommendation pursuant to 28 U.S.C. Section 636(b)(1)(B). This matter is now ready for consideration by the undersigned.

FINDINGS OF FACT

The plaintiffs brought this lawsuit, pursuant to 42 U.S.C. §1983, seeking declaratory judgment and injunctive relief to prevent the defendants from curtailing or limiting the service territory of the Grayson County Water District in violation of 7 U.S.C. §1926(b), KRS 96.045, and

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KRS 96.150 (DN 1). Plaintiffs moved for summary judgment (DN 10). The parties fully briefed the issues and the Court issued a memorandum opinion and order granting plaintiffs' motion in part and denying it in part (DN 17). The Court concluded the Grayson County Water District is entitled to the protections of 7 U.S.C. §1926(b) but it is not entitled to injunctive relief at the present time because no violation or threatened violation of §1926(b), KRS 96.045 or KRS 96.150 has occurred (DN 17, at 11-13).

Plaintiffs have now moved the Court for an award of \$40,000.00 for attorney's fees and an award of other expenses in the amount of approximately \$3,800.00, pursuant to 42 U.S.C. §1988. Defendants object to said motion.

CONCLUSIONS OF LAW

The Civil Rights Attorney's Fees Act of 1976, 42 U.S.C. §1988, permits a prevailing §1983 plaintiff to recover reasonable attorney fees. Farrar v. Hobby, 506 U.S. 103, 109 (1992); Hensley v. Eckerhart, 461 U.S. 424, 429 (1983). When the Court addresses a petition for attorney fees under §1988, it must first determine if the plaintiff is the prevailing party. Farrar, 506 U.S. at 109; Hensly, 461 U.S. at 433. The plaintiff is a prevailing party when actual relief on the merits of his or her claim--through an enforceable judgment, a consent decree, or a settlement--"materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." Farrar, 506 U.S. at 111-112 (citations omitted).

Plaintiffs' argue they satisfy the prevailing party standard because the Court found the Grayson County Water District is entitled to §1926(b) protection. Defendants argue this is not enough to satisfy the "prevailing party" test. The undersigned agrees. While the plaintiff's have

demonstrated that the Grayson County Water District is entitled to §1926(b) protection, they have failed to establish that defendants violated or threatened to violate §1926(b), KRS 96.045 or KRS 96.150 (DN 17 at 11-13). In short, plaintiffs have proved an element of their claim but not their claim. See Adams County Regional Water District v. Village of Manchester, Ohio, 2000 WL 1050916 *4 (6th Cir. 2000) (citing Lexington-South Elkhorn Water District v. City of Wilmore, Ky., 93 F.3d 230, 234 (6th Cir. 1996)). This is highlighted by the Court's comment "[i]f these facts change, the Water District can reopen this case for the purpose of seeking injunctive relief." (DN 17 at 12). More importantly, the Court's ruling has not materially altered the legal relationship between the parties because the behavior of the defendants has not been modified in a way that directly benefits the Grayson County Water District. See Farrar, 506 U.S. at 111-112.

RECOMMENDATION

For the foregoing reasons, the undersigned recommends that plaintiffs' motion for attorney's fees and expenses be denied.

This 11th day of September, 2000.



E. ROBERT GOEBEL
UNITED STATES MAGISTRATE JUDGE

NOTICE

Therefore, under the provisions of 28 U.S.C. Sections 636(b)(1)(B) and (C) and Fed.R.Civ.P. 72(b), the Magistrate Judge files these findings and recommendations with the Court

and a copy shall forthwith be mailed to all parties. Within ten (10) days after being served with a copy, any party may serve and file written objections to such findings and recommendations as provided by the Court. If a party has objections, such objections must be filed within ten (10) days or further appeal is waived. Thomas v. Arn, 728 F.2d 813 (6th Cir.), aff'd, U.S. 140 (1984). Counsel will please forward a copy of any objections to the undersigned Magistrate Judge at 126 United States Courthouse, 423 Frederica Street, Owensboro, Kentucky 42301.



E. ROBERT GOEBEL
UNITED STATES MAGISTRATE JUDGE

DATE: 9-12-00

Copies:

ENTERED
SEP 12 2000
JEFFREY A. APPERSON, CLERK
BY *J. Apperson*
DEPUTY CLERK