COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

REQUEST FOR ASSISTANCE IN THE APPOINTMENT OF BREATHITT COUNTY WATER DISTRICT COMMISSIONERS	)))	CASE NO. 2007-00493

O R D E R

Breathitt County Judge/Executive Harvey J. Richardson and three members of Breathitt County Fiscal Court have applied to the Commission for the appointment of certain persons to fill vacancies in the Board of Commissioners of Breathitt County Water District ("Breathitt District"). Finding that the original appointing and approving authorities are now in agreement on the persons to fill these vacancies and that these persons are qualified to serve, the Commission makes the jointly requested appointments.

Breathitt District, a water district organized pursuant to KRS Chapter 74, owns and operates facilities that provide retail water service to customers in Breathitt County, Kentucky.[1] For the calendar year ending December 31, 2006, Breathitt District had total

[1] Annual Report of Breathitt County Water District to the Public Service Commission of Kentucky for the Year Ended December 31, 2006 ("Annual Report") at 21. According to the Annual Report, Breathitt District served 93 customers as of December 31, 2006. It experienced significant growth in 2007. As of November 29, 2007, it was reported to have over 500 customers. See Letter from Tim Spencer, Arch Johnson, and Jeff Noble, Breathitt County Fiscal Court Commissioners, to Beth O'Donnell, Executive Director, Kentucky Public Service Commission (Nov. 29, 2007) ("Spencer Letter").

assets of $6,275,014[2] and total water operating revenues of $88,610.[3] A 5-member board of commissioners controls and manages Breathitt District's affairs.[4]

Breathitt County Fiscal Court created Breathitt District on August 28, 2003.[5] At that time, Breathitt County Judge/Executive Lewis W. Warrix appointed and Breathitt County Fiscal Court approved the following persons to serve as water district commissioners for a period of 4 years: John L. Smith, Jay Watts, Eugene Smith, Homer Johnson, and Alma Noble.[6] The appointment and approval did not establish staggered terms for these commissioners.[7]

On August 28, 2007, Judge/Executive Richardson appointed Leland Noble, Bobby Gross, Bobby Thorpe, Jr., Reeve Hudson, Jr., and Larry Hensley to replace the incumbent members of Breathitt District's Board of Commissioners and requested that

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[2] See Annual Report at 7.

[3] Id. at 21.

[4] KRS 74.020(1)(a) ("If a district lies wholly within a single county or operates as a single county district. . .the board of commissioners shall be composed of either three (3) or five (5) members as the county judge/executive shall determine.")

[5] Breathitt County Fiscal Court Ordinance No. 8-21-2003A.

[6] Minutes of Breathitt County Fiscal Court Meeting of August 28, 2003. The minutes do not expressly state the term of each appointment. In its first annual report to the Commission and each report thereafter, however, Breathitt District has reported the term of each commissioner as ending August 28, 2007. See Annual Report of Breathitt County Water District to the Public Service Commission of Kentucky for the Year Ended December 31, 2004 at 6.

[7] The Judge/Executive and Fiscal Court's actions failed to comply with KRS 74.020(1)(a), which provides that "[i]nitial appointments shall be for terms of two (2), three (3), and four (4) years, as designated by the court."

Breathitt County Fiscal Court approve these appointments. Breathitt County Fiscal Court refused.[8]

On November 28, 2007, Breathitt County Commissioners Tim Spencer, Arch Johnson, Jr., and Jeff Noble applied[9] to the Commission for reappointment of the incumbent board members: John L. Smith, Jay Watts, Vurl Fugate,[10] Homer Johnson, and Alma Noble. On November 30, 2007, Judge/Executive Richardson recommended to the Commission that his appointees should fill the vacancies and that the terms of the new appointees should be staggered.

Subsequently, Judge/Executive Richardson and the Breathitt County Commissioners reached agreement on appointments. On January 8, 2008, Judge/Executive Richardson appointed and Breathitt County Fiscal Court unanimously approved the following persons to serve as Breathitt District commissioners:[11]

Candidate	Term Ending Date
Bobby Thorpe	August 28, 2011
Bobby L. Gross	August 28, 2011
John L. Smith	August 28, 2010
Vurl Fugate	August 28, 2009
Jay Watts	August 28, 2009

[8] See Letter from Harvey J. Richardson, Breathitt County Judge/Executive, to Beth O'Donnell, Executive Director, Kentucky Public Service Commission (December 3, 2007).

[9] Spencer Letter.

[10] Mr. Fugate apparently was appointed and approved in 2005 to fill the term of Eugene Smith. Breathitt District first reports Mr. Fugate as a commissioner in its report to the Commission for 2005. Mr. Smith is not listed as a commissioner in that report. See Annual Report of Breathitt County Water District to the Public Service Commission of Kentucky for the Year Ended December 31, 2005 at 6.

[11] Minutes of Breathitt County Fiscal Court Meeting of January 8, 2008.

These appointments are subject to Commission approval.

Pursuant to KRS 74.020(1)(a), a county judge/executive appoints water district commissioners with the approval of the county's fiscal court. KRS 74.020(4), however, provides that the Commission shall fill a vacancy on the board of commissioners "if, within ninety (90) days following the expiration of the term, the vacancy has not been filled by the appropriate county judge/executive with approval of the fiscal court."

As the term of each Breathitt District commissioner expired on August 27, 2007, and the positions have been vacant for more than 90 days, the Commission has the statutory duty and the exclusive authority to fill the vacant positions.[12] While a county judge/executive and a county fiscal court may reach agreement on the vacant position, they lack authority to fill the vacancy once it has remained unfilled for more than 90 days. Any action on their part to appoint and approve a candidate at that time has limited legal effect and constitutes only a recommendation to the Commission.

While the Commission has exclusive authority to fill vacancies that exist for 90 days or more, we will defer to the local elected officials in those instances where the local appointing and approval authorities have reached agreement on a candidate.

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[12] KRS 74.020(4) provides:

> Vacancies shall be filled by the same appointing authority which is empowered to make the original appointment. Vacancies resulting from cause other than expiration of the term shall be filled for the unexpired term only. Notwithstanding the provisions of KRS 67.710, a vacancy resulting from the expiration of a term shall be filled by the Public Service Commission if, within ninety (90) days following the expiration of the term, the vacancy has not been filled by the appropriate county judge/executive with approval of the fiscal court.

Absent unusual circumstances that raise clear concerns about an agreed candidate's qualifications, such deference is appropriate because local officials generally have a better understanding of the candidates' qualifications and of the water district's needs and because these officials are directly accountable to the water district's customers through the ballot box.

Based upon the above and given that each of the agreed candidates meets the sole legal requirement to serve as a commissioner of Breathitt District,[13] the Commission finds that the agreed candidates should be appointed and approved to fill the vacant positions for the recommended terms. We further find that the proposed recommended terms will allow for staggered terms, will provide for continuity of leadership and direction, and are generally consistent with KRS 74.020(1)(a).

IT IS THEREFORE ORDERED that:

1. Bobby Thorpe, Jr. is appointed and approved to fill an existing vacancy on Breathitt District's Board of Commissioners. His term shall expire on August 28, 2011.

2. Bobby Gross is appointed and approved to fill an existing vacancy on Breathitt District's Board of Commissioners. His term shall expire on August 28, 2011.

3. John L. Smith is appointed and approved to fill an existing vacancy on Breathitt District's Board of Commissioners. His term shall expire on August 28, 2010.

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[13] Each agreed candidate is a resident of Breathitt County Water District. See Letter of Harvey J. Richardson, Breathitt County Judge/Executive, to Virginia Gregg, Staff Attorney, Kentucky Public Service Commission (Feb. 15, 2008). KRS 74.020(1)(a) provides that "[m]embers of the board shall be residents of the district, or of any incorporated or unincorporated area served by the district in the county in which the district was originally established. . . ."

4. Vurl Fugate is appointed and approved to fill an existing vacancy on Breathitt District's Board of Commissioners. His term shall expire on August 28, 2009.

5. Jay Watts is appointed and approved to fill an existing vacancy on Breathitt District's Board of Commissioners. His term shall expire on August 28, 2009.

Done at Frankfort, Kentucky, this 20th day of March, 2008.

By the Commission

ATTEST:

Executive Director