

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

JAMES F. DAUT AND WILLETTA RUSCONI)	
)	
COMPLAINANTS)	
)	
v.)	CASE NO. 97-056
)	
BOONE COUNTY WATER DISTRICT)	
)	
DEFENDANT)	

O R D E R

James F. Daut and Willetta Rusconi ("the Complainants") bring a formal complaint against Boone County Water District ("Boone District") in which they allege that the water district's decision to assess property owners for the construction of a water main extension is an unreasonable and improper practice. Boone District has moved to dismiss their complaint for lack of subject matter jurisdiction. At issue is whether the Commission possesses jurisdiction over assessments that a water district issues pursuant to KRS Chapter 74 for system improvements. Finding that the Commission lacks jurisdiction, we grant the motion and dismiss the complaint.¹

¹ Complainants brought their complaint on January 23, 1997. After Boone District answered the complaint and denied the allegations of improper and unreasonable conduct, the Commission on June 4, 1997, held an evidentiary hearing. Testifying at this hearing were the Complainants, Fred E. Zuckerman (an owner of property which abuts the proposed water mains), and Paul Kroger (Boone District's General Manager). During this hearing, Boone District moved for dismissal of the complaint. Following the evidentiary hearing, both parties submitted written briefs.

Boone District is a water district organized pursuant to KRS Chapter 74. It provides water service to approximately 10,368 customers in the unincorporated areas of Boone County, Kentucky.

Boone District proposes to construct approximately 17,500 linear feet of 12-inch and 9,000 linear feet of 16-inch water main. Under Boone District's proposal, a new 16-inch main will be constructed at the end of Boone District's existing main on U.S. Highway 42 near Union, Kentucky and extend along U.S. Highway 42 to Kentucky Highway 338. A new 12-inch main will be constructed that will connect to the 16-inch main at the intersection of U.S. Highway 42 and Kentucky Highway 338, and extend east along Kentucky Highway 338 to connect to an existing main.² No public or municipal utility currently provides water service to this area. Boone District and Boone County officials believe this area will experience significant growth and will therefore require water service. The estimated total cost of the proposed extension is \$1,120,910.40. Boone District intends to finance the proposed extension using contributions from Boone County Fiscal Court, internally generated funds, and assessments on properties that abut the proposed mains and benefit from their construction.

The Complainants own property that abuts the proposed water mains and which is subject to assessment. They allege that the method used to determine assessment amounts is improper and unduly discriminates against small landowners in favor of land developers. They further allege improprieties in a vote of affected landowners on the

² When the Commission heard this complaint, Boone District had not filed an application for Certificate of Public Convenience and Necessity to construct the proposed water line extension. Boone District has since made such application. See Boone County Water District, Case No. 97-339 (filed Sept. 4, 1997).

proposed assessment action. Finally, they allege that Boone District's use of assessments to fund the proposed extension is unreasonable and inappropriate.

Boone District has moved for dismissal of the Complaint on the grounds of lack of subject matter jurisdiction. It contends that the Commission does not possess the authority to make utility management decisions. Boone District's choice of financing methods is, it argues, a matter of managerial discretion which is outside the Commission's authority. It further argues that the assessment process is solely within the Boone County Judge/Executive's discretion. The Boone County Judge/Executive is not subject to the Commission's jurisdiction, nor are his decisions subject to Commission review.

* * * * *

KRS Chapter 74 authorizes water districts to assess property owners whose real estate may be affected by proposed water system construction. To issue such assessments, a water district must first classify all affected real estate in classes according to the benefits received from the proposed construction. Such classifications serve as the basis for any assessments. KRS 74.130(1). The water district must also prepare and submit to the county judge/executive a report which contains, inter alia, the cost of the proposed improvements, a description of the affected real estate, the names of the real estate owners, and a statement of the estimated benefits that will accrue to each class of real estate by reason of the proposed improvements. KRS 74.130(3).

Once the county judge/executive determines that the report is sufficient, a final hearing is held on the report. Notice of this hearing must be given to the public. Any landowner subject to the assessment may file an exception to the report. After holding

a final hearing, the county judge/executive must confirm or reject the report. KRS 74.140.

After the county judge/executive confirms the report, the water district prepares and submits to the county clerk an assessment roll which, inter alia, includes the total cost of the improvement, the total amount to be paid by the property benefited and the amount of assessment against each property tract. KRS 74.150(1). The county judge/executive must hold a public hearing on the proposed assessment roll and hear all objections to the cost of the improvement and to specific assessments. After the hearing, he may modify or confirm the assessment roll. KRS 74.150(2). Affected landowners may appeal the county judge/executive's decision. Id.

Assessments by their general nature are a tax. City of Olive Hill v. Gearhart, Ky., 157 S.W.2d 481 (1941). They are "local burdens laid on property made for a public purpose, but fixed in amount once and for all time with reference to the special benefit which such property derives from the cost of the project." Krumpelman v. Louisville & Jefferson County Metropolitan Sewer Dist., Ky., 314 S.W.2d 557, 561 (1958). Because assessments are "an enforced contribution on the property owner for the public benefit," Boone District's levy of such an assessment is "an exercise of the taxing power." Id.

Water districts are public utilities and are "subject to the jurisdiction of the Public Service Commission in the same manner and to the same extent as any other utility." KRS 278.015. The Commission has "exclusive jurisdiction over the regulation of rates and service of utilities." KRS 278.040(2). It further has primary and exclusive jurisdiction over complaints as to rates or service of any utility." KRS 278.260(1).

An assessment is not a "rate." A "rate" is:

any individual or joint fare, toll, charge, rental, or other compensation for service rendered or to be rendered by any utility, and any rule, regulation, practice, act, requirement, or privilege in any way relating to such fare, toll, charge, rental, or other compensation, and any schedule or tariff or part of a schedule or tariff thereof.

KRS 278.010(10). The assessed property owners will not receive utility service in return for payment of their assessment. Those who pay their assessment and subscribe for water service upon completion of the proposed mains will not receive any credit or reduced rate which reflects their assessment payment, but must pay the same rate as other Boone District customers. Payment of the assessment, moreover, is not a condition to receiving water service nor are the assessed property owners required to subscribe to water service upon completion of the proposed water mains. The proposed water mains, in fact, abut several undeveloped property tracts that currently have no need for water service.

Boone District's use of assessments to finance the proposed water mains is not "a practice or act affecting or relating to the service of the utility" for which a complaint may be brought. See KRS 278.260(1). KRS 278.010(11) defines "service" as:

any practice or requirement in any way relating to the service of any utility, including the voltage of electricity, the heat units and pressure of gas, the purity, pressure, and quantity of water, and in general the quality, quantity, and pressure of any commodity or product used or to be used for or in connection with the business of any utility.

"Service" encompasses the technical processes and practices which a utility uses to deliver service to the customer, not the methods to finance improvements for the delivery of that service.

As an assessment is neither a rate nor a practice or act related to utility service and as no provision of KRS Chapter 278 expressly authorizes our review or regulation of a water district's use of assessments to finance system improvements, the Commission finds that the complaint involves a matter outside the Commission's jurisdiction and should be dismissed for lack of subject matter jurisdiction. Our decision does not leave the Complainants without a forum to seek redress of their grievances. They have the right to contest Boone District's proposal in hearings before the Boone County Judge/Executive. If unsatisfied with his decisions, they may seek relief from the Kentucky judiciary.

IT IS THEREFORE ORDERED that:

1. Boone District's Motion to Dismiss for lack of subject matter jurisdiction is granted.
2. The Complaint is dismissed for lack of subject matter jurisdiction.

Done at Frankfort, Kentucky, this 9th day of October, 1997.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:


Executive Director