

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

CITY OF HAWESVILLE, KENTUCKY)	
)	
COMPLAINANT)	
)	
v.)	CASE NO. 2004-00027
)	
EAST DAVIESS COUNTY WATER)	
ASSOCIATION, INC.)	
)	
DEFENDANT)	

O R D E R

The city of Hawesville, Kentucky (“Hawesville”) has filed a formal complaint against East Daviess County Water Association, Inc. (“East Daviess”) in which it alleges that East Daviess is improperly providing water service without its consent to a person whom Hawesville previously served. Our review of the complaint indicates that the sole issue presented is whether the Commission has jurisdiction to resolve a territorial dispute between a municipal utility and a public utility. Finding in the negative, we dismiss the complaint on our own motion.

Hawesville is a city of the fifth class located in Hancock County, Kentucky. It owns and operates a water treatment and distribution system that provides retail water service to approximately 930 customers within its corporate limits.¹ East Daviess is a water association organized pursuant to KRS Chapter 273. It owns and operates a water distribution system that provides retail water service to approximately 4,112

¹ Governor’s Water Resource Development Commission, Water Resource Development: A Strategic Plan (1999), Appendix B – Green River Area Development District Water System Summaries at 14, at http://wris.ky.gov/wrdc_plan/gradd.pdf (last visited Mar. 17, 2004).

customers in Daviess, Hancock and Ohio counties.² It serves approximately 931 customers in Hancock County.³ East Daviess purchases its total water requirements from Owensboro Municipal Utilities.

On January 16, 2004, Hawesville filed with the Commission a formal complaint against East Daviess in which it alleges that East Daviess has extended its water mains and installed a water meter to provide water service to a Hawesville customer. Hawesville further alleges that East Daviess took these actions without Hawesville's consent and after advising Hawesville that it would not serve the customer in question.

In its answer, East Daviess admits providing water service to the customer, but denies constructing any facilities to serve him. It states that the customer installed a service line to an existing East Daviess water main, requested water service from the water association, and tendered the required meter installation fee. It asserts that under these circumstances, Commission regulations required it to provide water service.⁴

Our review of the pleadings leads us to question whether we have jurisdiction to resolve the matters alleged in the complaint.⁵ The Commission is "a creature of statute and has only such powers as have been granted to it by the General Assembly." Boone County Water and Sewer District v. Public Service Commission, Ky., 949 S.W.2d 588, 591 (Ky. 1997). See also Croke v. Public Service Commission of Kentucky, Ky.App.,

² Annual Report of East Daviess County Water Association, Inc. to Public Service Commission for the Year Ended December 31, 2002 at 4 and 27.

³ Governor's Water Resource Development Commission, supra note 3, at 13.

⁴ See Answer at 2; 807 KAR 5:006, Section 5.

⁵ In raising this issue on our own motion, we are acting within our authority. See Am. Jur.2d Administrative Law § 277 (May 2003) ("An administrative agency generally may and must determine whether it has jurisdiction in a particular situation.").

573 S.W.2d 927, 929 (1978) (“The Public Service Commission’s powers are purely statutory; like other administrative boards and agencies, it has only such powers as are conferred expressly or by necessary or fair implication.”). KRS 278.040(1) provides that the Commission has the authority to regulate public utilities⁶ and to enforce the provisions of KRS Chapter 278. This authority to regulate public utilities, however, extends only to rates and service. KRS 278.040(2).

The sole issue presented in Hawesville’s complaint is its purported exclusive right to serve an existing customer. Hawesville implies, though does not expressly state, that only it may provide water service to its existing customers and that East Daviess may not serve any of those customers without its consent. Hawesville presents no issue related to East Daviess’s rates or service. Its requested relief is a Commission directive prohibiting East Daviess from extending water service into areas that Hawesville presently serves.

Nothing within KRS Chapter 278 authorizes this Commission to establish or enforce exclusive service territories for water utilities. See Kentucky Utilities Co. v. Pub. Serv. Com’n, Ky., 390 S.W.2d 168, 175 (1965) (stating that existing utilities do not “have any right to be free of competition.”). Kentucky-American Water Co., Case No. 91-359 (Ky. P.S.C. Apr. 17, 1992); Mountain Utilities, Inc. v. Equitable Gas Co., Case No. 91-316 (Ky. P.S.C. Apr. 6, 1992). *Cf. Re Flowing Wells, Inc.*, 180 PUR 4th 117 (Ind. URC 1997). Neither KRS Chapter 96, which governs the operation and governance of

⁶ Municipal water utilities are generally excluded from the statutory definition of utility. See KRS 278.010(1)(d) (“‘Utility’ means any person except . . . a city, who owns, controls, operates, or manages any facility used or to be used for or in connection with . . . [t]he diverting, developing, pumping, impounding, distributing, or furnishing of water to or for the public, for compensation . . .”). But see Simpson County Water District v. City of Franklin, Ky., 872 S.W.2d 460 (1994).

municipal utilities, nor KRS Chapter 273, which governs water associations, conveys such authority to the Commission.

The Commission lacks any legal authority to resolve territory disputes that arise between municipal water utilities and public water utilities. City of Georgetown, Kentucky v. Pub. Serv. Com'n, Ky., 516 S.W.2d 842, 845 (1974) ("While it may be desirable that the Public Service Commission resolve this type dispute because of its expertise in this area, this is of legislative, not judicial, concern, and we feel compelled to follow the clear language of KRS 278.010(3)."). See also City of Lawrenceburg, Ky. v. South Anderson Water District, Case No. 1996-00256 (Ky. P.S.C. Jun. 11, 1998).⁷

Based upon the discussion above, we conclude that the Commission lacks subject matter jurisdiction over Hawesville's complaint and finds that the complaint should be dismissed.

IT IS THEREFORE ORDERED that Hawesville's complaint is dismissed with prejudice.

⁷ We note that the allegations in Hawesville's complaint, if liberally interpreted, might conceivably support the claim that East Daviess improperly provided water service without first obtaining a Certificate of Public Convenience and Necessity. In its complaint, Hawesville implies that East Daviess's provision of water service of the same nature and to the same location will result in the wasteful duplication of utility facilities. However, Hawesville neither expressly states nor implies that East Daviess's provision of service involves the construction of facilities that conflict with the service of other public utilities, involve sufficient capital outlay to materially affect East Daviess's existing financial condition, or will result in increased charges to East Daviess's customers. As such conditions are necessary to require a Certificate of Public Convenience and Necessity for construction that is otherwise considered in the ordinary course of business, East Daviess's lack of a certificate cannot serve as a basis to proceed with this case. See 807 KAR 5:001, Section 9(3).

Done at Frankfort, Kentucky, this 25th day of March, 2004.

By the Commission

ATTEST:

A handwritten signature in black ink, appearing to read "Charles H. [unclear]", written over a horizontal line.

Executive Director