

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

LEGAL QUALIFICATIONS OF TONI AKERS AND)
MICHAEL LITAFIK TO CONTINUE TO SERVE AS) CASE NO. 2009-00209
COMMISSIONERS OF MOUNTAIN WATER)
DISTRICT)

ORDER

This proceeding examines the qualifications of Toni Akers and Michael Litafik ("Respondents") to serve as members of Mountain Water District's ("Mountain District") Board of Commissioners. At issue is whether each Respondent meets the residency requirements set forth in KRS 74.020(1) to hold the office of a water district commissioner.¹ Finding in the negative, we direct their removal.

PROCEDURE

In April 2009, Commission Staff received allegations that the Respondents no longer resided in Mountain District's territory. Commission Staff submitted written inquiries to both commissioners regarding the location of their residences. Both confirmed in writing that their residences were no longer located in Mountain District's territory.²

On June 12, 2009, the Commission initiated a proceeding to determine if the commissioners resided within Mountain District's territory and, if not, whether they were

¹ Shortly after the Commission initiated this proceeding, the General Assembly enacted House Bill 4, which contains a provision related to a person's eligibility to serve as a water district commissioner. In reaching our decision today, we have fully considered that Act.

² Transcript of 7/9/2009 Hearing ("Transcript"), Commission Staff Exhibits 1 and 2.

disqualified from serving as members of Mountain District's Board of Commissioners. Ms. Akers and Mr. Litafik appeared before the Commission on July 9, 2009 and offered testimony on their behalf. Grondall Potter, Project Manager for Utilities Management Group, also testified. Following the hearing, each Respondent submitted a written statement.

STATEMENT OF THE CASE

Mountain District, a water district organized pursuant to KRS Chapter 74, owns and operates water treatment and distribution facilities that serve approximately 16,450 customers in Pike County, Kentucky. For the calendar year ending December 31, 2007, it had total water operating revenues of \$7,184,482 and possessed total assets and debits of \$65,941,716.³ Mountain District also owns and operates facilities that provide sewage disposal services to approximately 1,936 customers. For the calendar year ending December 31, 2007, it had total operating revenues of \$839,581 for sewage disposal and possessed total assets and debits of \$23,928,527.⁴ A five-member board of commissioners administers Mountain District.⁵

Mountain District is the product of the 1986 merger of John's Creek Water District, Marrowbone Creek Water District, Pond Creek Water District, and Shelby

³ *Annual Report of Mountain Water District to the Public Service Commission for the Calendar Year ended December 31, 2007 (Water Operations)* (hereinafter *Annual Report*) at 7 and 27. Mountain District has yet to file an annual report for its operations for the Calendar Year Ended December 31, 2008.

⁴ *Annual Report of Mountain Water District to the Public Service Commission for the Calendar Year ended December 31, 2007 (Sewer Operations)* at 2 and 8.

⁵ *Annual Report* at 6.

Valley Water District.⁶ On January 17, 1987, approximately seven months after Mountain District's creation, Pike County Judge/Executive Paul Patton established its territorial boundaries. These boundaries were:

All of Pike County, Kentucky, except (1) the territory of that portion of the Sandy Valley Water District located in Pike County, (2) the water service area of the City of Pikeville, (3) the water service area of the city of Elkhorn City, and (4) the water service area of the Mayo Village Water Company.⁷

At the time of Judge/Executive Patton's Order, Pikeville provided water service to virtually all of its corporate area. Since the establishment of these boundaries, Pikeville has expanded its corporate boundaries⁸ and acquired the facilities of Sandy Valley Water District⁹ and Mayo Village Water Company.¹⁰ As a result, Mountain District now provides water service to limited areas of Pikeville.

Toni Akers is Mountain District's chairperson. She is the longest-serving member of Mountain District's Board of Commissioners and has continuously served as a commissioner since 1986. Prior to serving as a Mountain District commissioner, she was a commissioner of Shelby Valley Water District.¹¹ She was most recently

⁶ Case No. 9499, *Application for Approval of Merger Between Marrowbone Creek Water District, Shelby Valley Water District, Pond Creek Water District, and John's Creek Water District* (Ky. PSC Jun. 27, 1986).

⁷ Order Establishing Territorial Limits of the Mountain Water District (Jan. 20, 1987) at 1.

⁸ For a summary of the expansion of Pikeville's corporate limits since 1980, see <http://apps.sos.ky.gov/land/cities/citydetail.asp?id=316&city=Pikeville&idctr=316> (last visited Aug. 17, 2009).

⁹ Case No. 2006-00327, *Joint Application of Sandy Valley Water District, Southern Water and Sewer District and The City Of Pikeville For Approval of The Transfer of Facilities and For The Assumption of Debt By Southern Water and Sewer District* (Ky. PSC Jan. 29, 2008).

¹⁰ Case No. 1990-00098, *Purchase of Mayo Village Water Company System, Inc. By The City of Frankfort* (Ky. PSC Apr. 19, 1990).

¹¹ Transcript at 13.

reappointed to Mountain District's Board of Commissioners on August 7, 2007.¹² Her term expires on July 31, 2011.

Ms. Akers does not reside in Mountain District's territory. In 2004, Ms. Akers moved from her residence in an unincorporated area of Pike County to 192 Bowles Park Drive in Pikeville, Kentucky.¹³ The property is located in an area that was within Pikeville's corporate area as of January 17, 1987 and received water service from Pikeville. Ms. Akers currently receives her water service from the City of Pikeville.

Ms. Akers stated that she and her husband jointly own three properties that receive water service from Mountain District.¹⁴ Mr. Potter testified that Mountain District provides water service to four properties and that Ms. Akers has some relationship to each property.¹⁵ Mountain District, however, does not issue a bill to Ms. Akers for water service to any of these properties¹⁶ nor is she considered the customer who is responsible for payment.¹⁷ Four limited liability companies, whose sole members are Jim Akers and Harold Akers,¹⁸ have contracted with Mountain District for water service

¹² EKB News, http://www.wdhr.com/news/2007_08_05_archive.html (last visited July 24, 2009).

¹³ Transcript at 12; see also Commission Staff Exhibit 1.

¹⁴ Transcript at 20, 22.

¹⁵ Mountain District's Response to the Commission's Order of June 24, 2009; Transcript at 44-48. In its response to the Commission's Order of June 24, 2009, Mountain District provided three contracts that it represented involved service to entities related to Ms. Akers. These contracts were for water service to A.A. &W. Coals, Inc.; South Akers Mining, LLC; Hubble Mining Company, LLC; and Riverside Supply, LLC. At the hearing, Mr. Potter identified Coal Ridge Machine LLC as another such entity.

¹⁶ Transcript at 22-23, 45.

¹⁷ *Id.* at 51, 68.

¹⁸ For the current legal status and ownership interests of these entities, see Transcript, Commission Staff Exhibits 21-23 and 25. For the current status and ownership interest of Coal Ridge Machine, LLC, see <http://apps.sos.ky.gov/corpsscans/Corporate/04/0549804-06-99999-20090408-ARP-3504758-PU.pdf>.

to these properties and are identified in the contracts for service as the user or customer.¹⁹ Mountain District issues a monthly bill for service to each of these companies.²⁰ Except that she is related to their members, Ms. Akers has no ownership or financial relationship to these companies.²¹

Michael Litafik is Mountain District's vice-chairperson. He has served on Mountain District's Board of Commissioners since 1999. He has been reappointed to the Board twice, most recently in 2005.²² Mr. Litafik does not reside in Mountain District's territory. In September 2008, Mr. Litafik moved from his residence in Phelps, Kentucky to 245 East Chloe Ridge in Pikeville, Kentucky.²³ The property is located in an area that was within Pikeville's corporate area as of January 17, 1987 and received water service from Pikeville. Mr. Litafik currently receives his water service from the City of Pikeville.

Mr. Litafik does not directly own any properties that receive water service from Mountain District.²⁴ Mountain District does not issue a bill directly to him for water service.²⁵ Mountain District has identified three locations that are served by the water

¹⁹ See *supra* note 15.

²⁰ Transcript at 45.

²¹ *Id.* at 66-68.

²² *Id.* at 24. Mr. Litafik's term expired on July 31, 2009. Water district commissioners continue to serve until their successors are appointed and qualified. KRS 65.008. See also OAG 82-176 ("[A] member of the Water District Board can hold over after the expiration of his term only where there is no regularly elected and qualified successor. Where such officers hold over, their official acts are valid until their successors are appointed and qualified.").

²³ Transcript, Commission Staff Exhibit 2.

²⁴ *Id.* at 27-28.

²⁵ *Id.* at 28.

district and in which Mr. Litafik has an indirect financial interest.²⁶ L&M Mart, Inc., a Kentucky corporation, has contracted with Mountain District for water service to these properties.²⁷ Mr. Litafik is an officer and shareholder in L&M Mart, Inc.²⁸ L&M Mart expends its own funds for water service and lists all costs for such service as an expense on its federal and state income tax returns.²⁹

DISCUSSION

The sole issue before the Commission is whether Ms. Akers and Mr. Litafik meet the legal qualifications to serve as members of Mountain District's Board of Commissioners.³⁰

KRS 74.020(1)(a) provides that members of a water district's board of commissioners "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." Any commissioner who moves "his residence outside of the jurisdictional limits . . . has disqualified himself and . . . [is] subject to removal."³¹ Until removed, however, the commissioner continues to serve as a *de facto* officer and his actions are valid as to third parties.³²

²⁶ Mountain District's Response to the Commission's Order of June 24, 2009; Transcript at 48-51.

²⁷ *Id.*

²⁸ *Id.* at 26-27. See also Commission Staff Exhibit 24.

²⁹ Transcript at 27.

³⁰ Water district commissioners are considered public officers. See *Commonwealth v. Howard*, 379 S.W.2d 475 (Ky. 1964).

³¹ OAG 76-381.

³² See *Com. Ex rel. Breckinridge v. Winstead*, 430 S.W.2d 647 (Ky. 1968).












As shown in Maps 1 and 2,³³ which reflect Mountain District's current territory, neither Respondent resides within Mountain District's territory. Their residences are located well within the corporate limits of Pikeville that existed as of January 17, 1987. At that time, Pikeville had water distribution facilities in these areas and was providing water service to the general areas where the Respondents' homes are currently located.

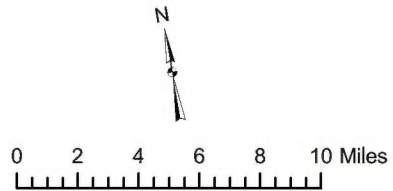
Notwithstanding that their residences are not located in Mountain District's territory, the Respondents contend that they meet the statutory residence requirements. They note that Mountain District provides water service to a portion of Pikeville. To the extent that they reside in Pikeville and Pikeville is an incorporated area that Mountain District serves and is in the county in which Mountain District was originally established, they assert, the statutory residency requirements have been met. Simply put, they argue that a water district's provision of water service to "any incorporated area" is service to all of a city's incorporated area, regardless of whether such service is actually provided to the entire area.

Based upon our review of KRS 74.020(1), we find the phrase "any incorporated area" to be ambiguous. The Respondents define "any incorporated area" to include not only the geographical area actually served by a water district, but the entire political subdivision of which the geographical area served may be but a small part. This phrase, however, can also be easily interpreted as referring only to the actual portion of a city that a water district actually serves. Given the existence of an ambiguity, the

³³ At the hearing in this matter, the Commission heard and received extensive evidence on Mountain District's boundaries and the areas that Pikeville serves and the location of its facilities. Maps 1 and 2 are derived from that evidence.

MAP 1 Mountain Water District Territorial Boundaries









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|---|--|
|  Mountain Water District (Jan. 17, 1987) |  Commissioner Residence |
|  Sandy Valley Water District |  County boundaries |
|  City of Pikeville Corporate Boundaries at end of 1986 |  State boundaries |
|  Elkhorn City Corporate Boundaries at end of 1986 | |
|  Mayo Village | |
-
- Water Lines from the Water Resource Information System (2008)
- | | |
|--|--|
|  Mountain Water District |  Elkhorn City Water Department |
|  Pikeville Water Department |  Jenkins Water System |
| |  Prestonsburg City Utilities Commission |
| |  Southern Water & Sewer District |
| |  Other Utility Water Lines |



Compiled by the Public Service Commission on August 17, 2009

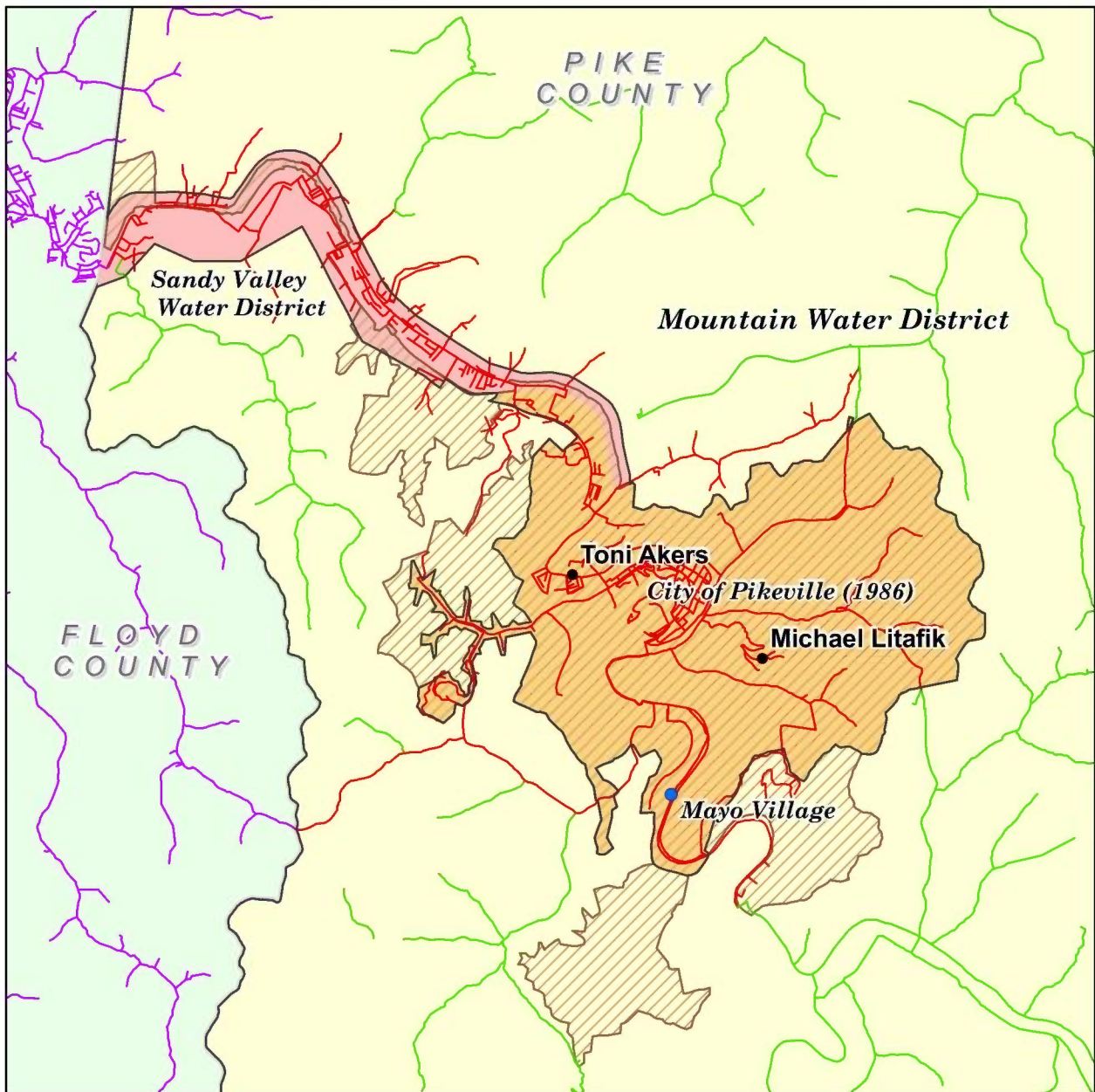


MAP 2 Mountain Water District in Pikeville Area

- Commissioner Residence
 -  Overlay of Pikeville Corporate Boundaries (filed with SOS as of May 2009)
 -  City of Pikeville Corporate Boundaries at end of 1986
 -  Mountain Water District (Jan. 17, 1987)
 -  Sandy Valley Water District
 - Mayo Village
 -  County Boundaries
- Water Lines from the Water Resource Information System (2008)
-  Mountain Water District
 -  Pikeville Water Department
 -  Southern Water & Sewer District



Compiled by the Public Service Commission on August 18, 2009



Commission may make use of the rules of statutory construction to ascertain the phrase's meaning.

We look first to how the phrase is used within KRS Chapter 74.³⁴ The term "incorporated" appears in KRS Chapter 74 only three times. KRS 74.020(1) refers to "incorporated area." KRS 74.120(1)³⁵ contains the phrase "incorporated city." KRS 74.410 refers to "incorporated municipality."³⁶ The use of the phrase "incorporated area served by the district" instead of "incorporated city" or "incorporated municipality" suggests a more limited and narrower coverage. If the General Assembly had intended

³⁴ See, e.g., *Popplewell's Alligator Dock No. 1, Inc. v. Revenue Cabinet*, 133 S.W.3d 456, 465 (Ky. 2004) ("One of the fundamental maxims of statutory construction is that an act 'is to be read as a whole[.]' i.e., 'any language in the [act] is to be read in light of the whole [act], not just a portion of it.'").

³⁵ All or any part of an **incorporated city** may be included in the boundaries of any existing water district or water district being newly organized, provided the governing body of such city by resolution or ordinance gives, or has given, its consent. Said consent may be limited to water, gas or sewage service, and the authority of the water district to serve the area of the **incorporated city** shall be limited by the exclusion of any type of service from the consent given. Any city which has been included in the boundaries of a water district for ten (10) or more years shall be deemed to have given its consent to the service, whether water, gas, or sewage, which has been provided for such period. The acquisition by a water district of an existing franchise for a water, gas, or sewage distribution system within such a city, whether by purchase, assignment or otherwise, shall be deemed to constitute the consent of the city which granted the franchise in the first instance, but only for the purpose of operating the type of distribution system for which the franchise was granted.

³⁶ The commissioners of a water district, in order to abate possible health menaces in their area and to increase the consumption of water in the area, or whenever such commissioners deem it to be for the general benefit of the water district, shall have the authority to contract with any city, water district or sewer construction district, or other incorporated municipality or district, to provide for the operation of a water system, or a sanitary sewer system, or both, regardless of whether or not such water district operated by said board of commissioners has or will acquire any ownership rights in such systems to be so operated, upon such terms and conditions as such board of commissioners may deem appropriate, with or without any consideration being paid to or received by such water districts, other than the general benefit which may accrue to the water district from having more water or sewer customers and consequent increased use of water or sewer services.

to confer eligibility upon any person residing in an incorporated city served by a water district, it would have used the term “city” instead of “area.”

Moreover, the legislative history³⁷ of KRS 74.020 and 74.120 suggests that “incorporated area” did not necessarily include the entire incorporated area of a city. Prior to 1962, membership in a water district’s board of commissioners was limited to residents of the district.³⁸ In that year, the General Assembly amended KRS 74.120 to permit a water district to contract to provide water or gas service to a city not within a water district’s territory and to permit such cities to be deemed part of the water district for purposes of representation on the board of commissioners for the life of the contract.³⁹

In 1966, the General Assembly amended KRS 74.120 again to provide that a city had consented to a water district’s operation of a water, gas or sewer system within a city when that district acquired the existing franchise of an existing system. This consent was limited to the operation of the existing system, not the city’s inclusion within the water district’s territory. In the same legislation, the General Assembly also amended KRS 74.020 to permit residents “of any incorporated or unincorporated area served by the district in which the district was originally established” to serve as water district commissioners.⁴⁰ The amendment addressed those situations in which a water

³⁷ See *Mitchell v. Kentucky Farm Bureau Mut. Ins. Co.*, 927 S.W.2d 343, 346 (Ky. 1996) (“The principal rule of statutory construction is that the applicability and scope of a statute may be determined by ascertaining the intent and purpose of the legislature and by considering the evil which the law is intended to remedy as well as other prior and contemporaneous facts and circumstances which shed intelligible light on the intention of the General Assembly.”).

³⁸ When the General Assembly first authorized the creation of water districts, any resident of the county in which the water district was located could serve as a commissioner. See 1926 Ky. Acts 667.

³⁹ 1962 Ky. Acts 760.

⁴⁰ 1966 Ky. Acts 703.

district provided service within a city's corporate limits but without a contract or the city's actual consent. It is additional recognition that a water district could serve outside its territory and that those receiving such service should be afforded representation upon the district's board of commissioners. There is no evidence that areas of a city that were receiving utility service from a municipal utility were intended to be included. Residents of those areas would not have required any representation upon the water district board since they had a voice in the management and operation of their municipal utility through their right to vote in city elections.

The Respondents' interpretation is also contrary to the rules of statutory construction because it produces absurd results.⁴¹ For example, under the Respondents' interpretation, if a city annexes any portion of any area presently served by a water district, no matter how small, all city residents are "served" and all may serve as water district commissioners. Moreover, since KRS 74.020(1) also refers to "unincorporated areas," if two water districts (Water Districts A and B) were serving unincorporated areas of the same county and each district was originally established in that county, persons residing in an unincorporated area served by Water District A would be eligible to serve as commissioners of Water District B, since Water District B serves unincorporated areas of the county. The Respondents' interpretation would likely lead to the appointment of persons who possess little or no connection to the area that a water district serves – a result that is significantly at odds with the legislative history and apparent intent of KRS 74.020.

⁴¹ *George v. Alcohol Beverage Control Bd.*, 421 S.W.2d 569, 571 (Ky. 1967) ("a statute must not be interpreted so as to bring about an absurd or unreasonable result").

The Respondents also argue that, as customers of Mountain District, they may serve on its Board of Commissioners. They refer to recently enacted House Bill 4⁴² that provides:

Notwithstanding KRS 74.020(1)(a), members of a water district's board of commissioners shall be residents **or customers** of the district, or of any incorporated or unincorporated area served by the district in the county in which the district was originally established, who shall be appointed by the county judge/executive with the approval of the fiscal court.

They assert that they are customers, since they have some relationship to the certain properties or businesses that receive water service from Mountain District.

Neither House Bill 4 nor KRS Chapter 74 defines "customer." *Black's Law Dictionary* defines "customer" as:

One who regularly or repeatedly makes purchases of, or has business dealings with, a tradesman or business. Ordinarily, one who has had repeated business dealings with another. A buyer, purchaser, consumer or patron.

Black's Law Dictionary 348 (5th ed. 1979).⁴³

Based upon this definition, neither Respondent can be considered a Mountain District customer. Neither has a contract for water service with Mountain District. Neither is billed for water service. Neither pays for water service with his or her own funds or on his or her behalf. While Mr. Litafik is a shareholder and officer of a corporation that receives water service from Mountain District, that corporation is considered a separate and distinct legal entity. Ms. Akers, being neither a member nor

⁴² H.B. 4, 2009 General Assembly (Extraordinary Session) (2009).

⁴³ See also *Aiken Mills v. U.S.*, 53 F.Supp. 524 (D.C.S.C. 1944).

employee of the limited liability companies that own the properties that Mountain District serves, has no legal relationship to those companies.⁴⁴

Having reviewed the record and being otherwise sufficiently advised, the Commission finds that neither Ms. Akers nor Mr. Litafik resides in Mountain District's territory or in an area that Mountain District serves and that neither are Mountain District customers. They therefore do not meet the legal qualifications to serve as water district commissioner.

KRS 74.455(1) provides:

From and after the creation and establishment of a water district and the appointment of water commissioners to manage the affairs of the district, and following the acquisition or construction by any duly created and established water district of a public water system, and the consequent establishment of regulatory jurisdiction over such water district by the Public Service Commission of Kentucky, the Public Service Commission may remove any water commissioner from his office for good cause, including, inter alia, incompetency, neglect of duty, gross immorality, or nonfeasance, misfeasance, or malfeasance in office, including without limiting the generality of the foregoing, failure to comply with rules, regulations, and orders issued by the Public Service Commission.

A water district commissioner's failure to maintain his residency in the water district's territory or otherwise meet the statutory residency requirements for office constitutes good cause for removal.

Accordingly, we find that the Respondents should be removed from office. We do not take this action lightly. Ms. Akers and Mr. Litafik have long and faithfully served

⁴⁴ Having determined that neither Respondent is a "customer" of Mountain District, the Commission finds no need to address whether the provisions of HB 4 that relate to water district commissioners may be applied to persons who were serving in the office of water district commissioner and no longer qualified to serve in that office at the time of HB 4's enactment and whether those provisions are contrary to the Kentucky Constitution.

Mountain District and its customers and have expressed a desire to continue in such service. The record contains no evidence that they have failed to properly perform their duties.⁴⁵ Our action today should not be construed as any statement or finding regarding the quality of their service as water district commissioners.

Notwithstanding the quality of their service and their desire to continue in office, neither Ms. Akers nor Mr. Litafik presently meet the statutory qualifications to serve as a member of Mountain District's Board of Commissioners. The Legislature has mandated that only persons meeting these qualifications may hold the office of water district commissioner and has entrusted this Commission with the duty to enforce its laws in this area. The principles of representative constitutional government require us to fulfill that duty.

IT IS THEREFORE ORDERED that:

1. Toni Akers and Michael Litafik are removed from their offices as commissioners of Mountain District effective immediately.
2. A copy of this Order shall be served upon the Pike County Judge/Executive.

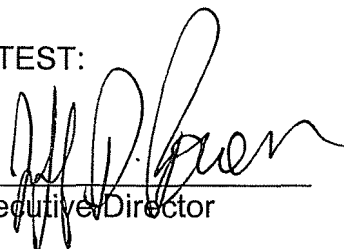
⁴⁵ The Commission has previously appointed Mr. Litafik to Mountain District's Board of Commissioners. See Case No. 2001-00379, *Mountain Water District's Petition For Appointment of Commissioners Pursuant to KRS 74.020(1)* (Ky. PSC Dec. 7, 2001).

By the Commission

Commissioner Borders abstains.

ENTERED
AUG 20 2009 ^{EW}
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:



Executive Director

Case No. 2009-00209

Toni Akers
PO Box 392
Pikeville, KY 41501

Toni Akers
Chairperson
Mountain Water District
6332 Zebulon Highway
P.O. Box 3157
Pikeville, KY 41502-3157

Will Brown
Superintendent
Mountain Water District
6332 Zebulon Highway
P.O. Box 3157
Pikeville, KY 41502-3157

Mike Litafik
7617 Upper Johns Creek Road
Phelps, KY 41553