

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ROY G. COOKSEY)	
)	
COMPLAINANT)	
V.)	CASE NO.
)	2013-00109
WARREN COUNTY WATER DISTRICT)	
)	
DEFENDANT)	

ORDER

On March 15, 2013, Complainant Roy G. Cooksey ("Complainant") filed a Complaint against Warren County Water District ("Warren District"), pursuant to KRS 278.260 and KRS 278.280, for an Order: (1) directing Warren District to petition the Warren County Judge/Executive to extend Warren District's territory to include Complainant's farm in its entirety; and (2) directing Warren District to extend water and sewer service to the portion of his farm that Warren District does not currently serve.

PROCEDURAL BACKGROUND

There are no intervenors in this case. On August 1, 2013, the Commission issued a procedural schedule providing for discovery, filing of testimony, and a hearing. On September 9, 2013, Complainant filed a request for information from Warren District. Complainant filed a supplemental request for information on November 18, 2013. Warren District responded to both requests for information on September 18, 2013, and January 13, 2014, respectively, but did not file any requests for information. No written testimony was filed by either party. On December 20, 2013, Staff held an informal conference in which the parties agreed to modify the procedural schedule, cancelling

the scheduled hearing and submitting the matter for decision after each party tendered briefs and rebuttal briefs. On January 23, 2014, a stipulation of facts between the parties was filed, signed by representatives of both parties. On February 17, 2014, both parties submitted briefs, and on February 28, 2014, both parties tendered reply briefs. The matter now stands submitted for a decision.

BACKGROUND

Complainant owns a farm comprising approximately 101 acres¹ in Warren County, Kentucky, which he acquired by deed dated January 2, 1976, and which he has continuously owned since that date. The farm is located outside the corporate limits of Bowling Green, Kentucky. It was acquired by one boundary, not in tracts, and has never been subdivided in any manner.

Warren District, a water district organized pursuant to KRS Chapter 74, owns and operates facilities in Warren County, Kentucky, providing water service to 26,337 customers² and sewer service to 5,220 customers.³ In existence since 1964, it serves mostly the non-incorporated areas of Warren County. It does not own or operate any water or sewage treatment facilities, but purchases its total water requirements from Bowling Green Municipal Utilities Board ("BGMU") and transports all collected sewage to BGMU for treatment.

¹ The initial Complaint states that the farm is approximately 101 acres. The parties have stipulated that Complainant's farm contains 30 acres that are within Warren District's territorial limits and 70 acres which are outside of Warren District's territory.

² *Annual Report of Warren County Water District to the Public Service Commission of the Commonwealth of Kentucky for the Calendar Year Ended December 31, 2013 (Water Operations)* at 27.

³ *Id.* at 12.

In 1975, the Warren Fiscal Court established Warren District's territorial boundaries. Approximately 30 acres of Complainant's roughly 101 acres are within Warren District's boundaries, and the remaining 70 acres are outside of Warren District's boundaries. In 2006, the governing bodies of BGMU and Warren District adopted service areas for their water services, and in 2007, these governing bodies adopted similar service areas for their sewer services. These limits are identical to Warren District's territorial boundaries, with approximately 30 acres of Complainant's property within Warren District's service area and the remaining 70 acres within BGMU's service area.

Warren District or its predecessor has provided water service to the farm since before Complainant's acquisition of the property. Warren District also provides sewer service to the farm. Warren District serves the farm through a 10-inch water main and a 1-inch water service line. It has made sewer service available to the property through an 8-inch sewer main that runs along Lovers Lane. No other utility has ever provided water or sewer service to the farm. BGMU's closest sewer line is over 1,700 feet from the farm, and BGMU holds no current easements which would allow it to install a sewer line on the property.

On May 18, 2009, Complainant filed a complaint against BGMU and Warren District in which he asked the Commission to order BGMU and Warren District to adjust their agreed service areas and to declare Warren District the exclusive provider of water and sewer service to his entire farm.⁴ He also requested termination of BGMU's right to provide water or sewer service to the 70 acres of his farm. Upon BGMU's motion, that

⁴ Case No. 2009-00190, *In the Matter of: Roy G. Cooksey, M.D., Complainant v. Bowling Green Municipal Board and Warren County Water District, Defendants.*

complaint was dismissed. The Commission found no statutory authority to permit us to preclude BGMU from serving Complainant's farm or to adjust BGMU's service area, and expressly stated that we lacked authority to declare Warren District the sole provider of water and sewer service to the Complainant's farm. However, a footnote in that Order specifically stated that:

In dismissing this case, we make no finding as to whether a voluntary agreement between a municipal utility and a public utility regarding the allocation of service areas limits the Commission's authority under KRS 278.280 to require the public utility to make extensions of service that are contrary to or inconsistent with such agreement.⁵

Now, citing this footnote, Complainant requests that the Commission order Warren District to extend water and sewer service, pursuant to KRS 278.280, to his entire farm, despite Warren District's voluntary agreement with BGMU.⁶

Complainant's Position

Complainant argues that KRS 278.280(3)⁷ empowers the Commission to hear and determine the reasonableness of an extension when a person comes before the Commission and asks for a reasonable extension. Complainant contends that 278.280(3) is directly applicable to the instant case because Warren District is a jurisdictional utility which provides service to 30 acres of the farm but declines to serve to the remaining 70 acres because of its agreement with BGMU.

⁵ *Id.*, Order of April 16, 2010 at 9, fn 27.

⁶ Reply Brief on Behalf of Complainant, Roy G. Cooksey, M.D. at 2.

⁷ KRS 278.280(3) states "Any person or group of persons may come before the commission and by petition ask that any utility subject to its jurisdiction be compelled to make any reasonable extension. The commission shall hear and determine the reasonableness of the extension, and sustain or deny the petition in whole or in part."

In support of its position, Complainant cites *Cumberland Valley Rural Electric Cooperative Corporation v. Public Service Commission*, 433 S.W.2d 103 (Ky. 1968), in which the appellate court stated that:

Under any normal circumstance, if a utility has been rendering service to a tract of land owned as a single boundary, extension of the service lines to any point in the boundary to serve an owner or tenant would reasonably be considered to be an ordinary extension in the usual course of business. It also would be reasonable to consider that the entire boundary is within the service area of the utility so long as it remains in one ownership.⁸

Complainant further contends that utilities providing water and sewer services do not have statutorily defined certified territories, and therefore the Commission is authorized to approve the Complainant's request for an extension.⁹

Moreover, Complainant avers that no other sewer service is reasonably available to him because the BGMU sewer line is over 1,700 feet from his property, would cost an estimated \$300,000 to install and would cause Complainant to obtain easements across adjacent property.¹⁰

Complainant refers to the argument that, as a result of the service agreement between Warren and BGMU, BGMU has the exclusive right to serve the area of the farm outside of Warren District's territory and service area.¹¹ However, relying on the

⁸ *Cumberland Val. R. E. Coop. Corp. v. Public Serv. Com'n*, 433 S.W.2d 103, 104 (Ky. 1968).

⁹ Brief on Behalf of Roy G. Cooksey, M.D. at 5.

¹⁰ *Id.*

¹¹ *Id.*

unpublished opinion of *Carroll County Water District No. 1 v. Gallatin County Water District* (Ky. Court of Appeals, April 23, 2010), Complainant states that a water utility does not have an exclusive right to serve its territory, and indeed, that a water district has a legal duty to serve parties within its territory if service can be reasonably extended.¹² Complainant acknowledges that part of the farm is not in Warren District's territory, but states that such area is not in any other utility's territory either.¹³

Complainant submits that the service-area agreement between Warren District and BGMU improperly limits the Commission's ability to make reasonable extensions of service, pursuant to 278.280.¹⁴ He contends that the agreement is invalid because Warren District did not have the authority to make an agreement regarding the rear 70 acres outside of its territory.¹⁵ In both his original brief and reply brief, Complainant avers that the service agreement between Warren District and BGMU has the effect of granting exclusive jurisdiction over the 70 acres outside of Warren District's territory to BGMU.

Finally, Complainant, citing two prior Commission cases,¹⁶ notes that the Commission is authorized to direct a water district to seek an expansion of existing

¹² *Id.* at 5-6; Reply Brief on Behalf of Complainant, Roy G. Cooksey, M.D. at 2.

¹³ Brief on Behalf of Roy G. Cooksey, M.D at 6.

¹⁴ *Id.* at 6; Reply Brief on Behalf of Complainant, Roy G. Cooksey, M.D. at 3.

¹⁵ Brief on Behalf of Roy G. Cooksey, M.D at 6.

¹⁶ Case No. 8505, *Application of Campbell County, Kentucky Water District for Authority to Acquire and to Operate the Silver Grove Water Distribution Facilities at its Existing Rates; to Construct a Connecting Water Supply Main; and to Assume Certain Financial Obligations; and, Also to Reinforce the District's Existing High and Low Pressure Service Systems as Needed*, Order (Ky. PSC Aug. 4, 1982) and Case No. 90-220, *Christian County Water District's Proposed Extension to Collins Bridge Road and the Provision of Service to Certain Customers Who Are Currently Served By South Hopkins Water District*, Order (Ky. PSC Feb. 20, 1991).

boundaries to make a reasonable extension of services from the County Judge/ Executive.¹⁷ Based on these cases, he argues that the Commission should direct Warren District to seek an extension of service because Warren District has water and sewer lines on the front part of the farm, and that BGMU's line is 1,700 feet away from the farm.¹⁸ Additionally, he contends the extension of service would not result in a wasteful duplication of service.¹⁹ However, both of these cases are factually distinguishable from the case currently before the Commission.

In *Campbell County*, the Campbell County Water District asked the Commission, among other things, for authorization to acquire and operate the existing water distribution facility of the city of Silver Grove.²⁰ In that case, the Commission found that the Campbell County Water District "may acquire and operate an existing water system only if it lies wholly within the District's territorial limits as established by the county judge/executive."²¹ We determined that the Silver Grove facility did not lie within the territorial limits of the water district, and we ordered Campbell County Water District's request for authority to acquire and operate the Silver Grove water facility be held in

¹⁷ Brief on Behalf of Roy G. Cooksey, M.D at 7.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Case No. 8505, *Application of Campbell County, Kentucky Water District for Authority to Acquire and to Operate the Silver Grove Water Distribution Facilities at its Existing Rates; to Construct a Connecting Water Supply Main; and to Assume Certain Financial Obligations; and, Also to Reinforce the District's Existing High and Low Pressure Service Systems as Needed* (Ky. PSC Aug. 4, 1982), Order at 1.

²¹ *Id.* at 2.

abeyance until the water district enlarged its territorial limits to include the Silver Grove facility.²²

In *Christian County*, the Commission initiated the proceeding to consider Christian County Water District's proposed extension to customers within its territorial boundaries that were being served by South Hopkins Water District.²³ In that case, Christian County Water District asked the Commission to determine its right to serve nine customers who resided in Christian County but were being served by South Hopkins Water District, as well as additional customers who were without water service.²⁴ In that proceeding, South Hopkins Water District admitted that it erred by extending its lines into Christian County without permission of the Christian County Judge/Executive.²⁵ The Commission determined that it did not have the statutory authority to allow South Hopkins Water District to continue to serve customers in Christian County Water District's service area without the approval of the Christian County Judge/Executive, and required South Hopkins Water District to obtain an order from the Christian County Judge/Executive for authority to extend service to a specific customer.²⁶

Therefore, Complainant asks that the Commission enter an order requiring Warren District to petition the Warren County Judge/Executive to amend the territorial

²² *Id.*

²³ Case No. 90-220, *Christian County Water District's Proposed Extension to Collins Bridge Road and the Provision of Service to Certain Customers Who Are Currently Served by South Hopkins Water District*, (Ky. PSC Feb. 20, 1991), Order at 1.

²⁴ *Id.* at 1.

²⁵ *Id.* at 3.

²⁶ *Id.* at 5.

limits to include his entire farm. Additionally, he requests the Commission to determine that the requested extension of water and sewer service to the area outside of Warren District's territory be deemed an ordinary extension of such utility service in the usual course of business.

Warren District's Position

Warren District contends that the Commission's finding in the 2009 case that we lack jurisdiction to direct revisions to a municipal utility's service area or to prohibit or otherwise limit a municipal utility's service to a geographical area, and that we lack authority to declare Warren District the sole provider of water or sewer service to Complainant's farm, precludes a ruling for Complainant.²⁷ Warren District also specifically points to our determination that since BGMU is not a utility, the Commission has no authority over its service and cannot direct it to modify its service-area boundary to exclude the area in which a portion of Complainant's farm is located.²⁸ Warren District notes that no facts have changed since the final order was issued in the 2009 case, and that Complainant seeks the same relief in the instant matter that he sought in the 2009 case.²⁹ Warren District cites the Commission's finding that we lack the statutory authority to provide Complainant's requested relief, specifically our holding that the Commission cannot preclude BGMU from serving the area in dispute or direct a revision to BGMU's service area and that we lack authority to declare Warren District

²⁷ Brief on Behalf of Defendant, Warren County Water District, at 3.

²⁸ Case No. 2009-00190, *In the Matter of: Roy G. Cooksey, M.D., Complainant v. Bowling Green Municipal Board and Warren County Water District, Defendants*, Order of April 16, 2010 at 7.

²⁹ Brief on Behalf of Defendant, Warren County Water District at 10.

the sole provider of water and sewer service to the farm.³⁰ Therefore, Warren District avers that we cannot grant the relief Complainant seeks.

Warren District also argues that BGMU is an indispensable party to this proceeding, and absent its joinder, the matter cannot be adjudicated by the Commission. Warren District avers that Complainant is attempting to set aside the contractual agreement between Warren District and BGMU, and thus, both parties must be before the Commission before we can adjudicate the validity of the service-area boundary agreements.³¹ Since BGMU is not a party to this matter, Warren District avers that the Commission cannot reach the merits of the validity of the agreement.³²

Finally, Warren District avers that Complainant cannot meet his burden of proof in this matter and thus cannot prevail. Warren District references an Attorney General Opinion that was cited in the April 16, 2010 Order in Case No. 2009-00190 that a "water district is under an obligation to serve all inhabitants, including the subject applicant, within its geographical area of service as fixed under KRS 74.010 and as defined by the certificate of convenience and necessity."³³ Warren District further cites from that opinion:

Thus, in the absence of fraud, corruption, or arbitrary action, the judgment of the Board of Commissioners of the water district as to the general management of the affairs of the district is beyond judicial control.

Thus, it is our opinion that the commissioners of the district exercise a discretionary function in deciding whether or not

³⁰ *Id.*

³¹ *Id.* at 11.

³² *Id.*

³³ Case No. 2009-00190, *In the Matter of: Roy G. Cooksey, M.D., Complainant v. Bowling Green Municipal Board and Warren County Water District, Defendants* (Ky. PSC Apr. 16, 2010), Order at 9, fn 27.

to extend its system to an entirely new section within its certified area. The courts or Public Service commission would not, we believe, turn them around as to its decision, except where abuse of discretion or arbitrary or fraudulent action is shown ... The interest of a few must be carefully weighed against the interest of the general public in the certified area of service.³⁴

Based on this opinion, as well as KRS 74.070(1), Warren District argues that its service area cannot be "reasonably extended" because it has a binding service-area agreement with BGMU which covers the Cooksey farm.³⁵ Additionally, Warren District points out that Complainant does have current access to service through BGMU.³⁶ Warren District also notes that territorial boundaries are not synonymous with service area, so even if the Commission granted Complainant's request to change Warren District's territorial boundaries, the service agreement between Warren District and BGMU would remain in effect, precluding Warren District from serving the 70 acres of Complainant's farm within BGMU's service area.³⁷

For all of these reasons and those set forth in its briefs, Warren County asks the Commission to deny Complainant's requests.

FINDINGS

Having reviewed the record and being otherwise sufficiently advised, the Commission finds that Complainant has not adequately established that Warren District

³⁴ OAG 75-719.

³⁵ Brief on Behalf of Defendant, Warren County Water District at 13; Reply Brief on Behalf of Defendant, Warren County Water District at 3.

³⁶ In his Reply Brief, Complainant states that this fact has not been stipulated to and any reference to BGMU having water service available should be disregarded.

³⁷ Brief on Behalf of Defendant, Warren County Water District at 13-14; Reply Brief on Behalf of Defendant, Warren County Water District at 4.

should be required to extend water and sewer service to the rear 70 acres of Complainant's farm. Additionally, the Complainant has not demonstrated a need for an Order requiring Warren District to petition the Warren County Judge/Executive to extend its territorial limits to include the entirety of Complainant's farm. Therefore both of Complainant's requests for relief are denied.

The Stipulation entered into the record and agreed to by the parties reflects that, as a result of the territorial boundaries established by the Warren Fiscal Court in 1975, the 30 acres adjacent to Lovers Lane are within the current Warren District territorial limits, and the remaining 70 acres are outside of Warren District's service territory.³⁸ The Stipulation also states that "no other utility has sewer service presently available to the Cooksey Farm," but, in the same paragraph, states that BGMU has a sewer line over 1,700 feet, or over 0.32 miles, from the farm.³⁹ Although the Stipulation states that only Warren District has sewer service presently available to the farm, the record shows that BGMU's sewer line is nearby and could be used to provide sewer service to the rear 70 acres of the farm. Indeed, the record indicates that the only basis on which Complainant seeks service from Warren District for the rear 70 acres is allegedly a lower cost. However, Complainant fails to provide evidence that service from Warren District is actually the lowest-cost service available. Although the record shows that Complainant avers that service from BGMU would cost \$300,000, there is no estimate of cost for service from Warren District if the remaining 70 acres were within its boundary, nor is there an estimate of cost of service from BGMU confirming

³⁸ Stipulation of Facts, Paragraph 5 at 2.

³⁹ *Id.*, Paragraph 7 at 2.

Complainant's estimated cost. Without such evidence, Complainant cannot sustain his burden.

The Commission also finds, pursuant to KRS 74.110, that it cannot simply order Warren District to serve the portion of Complainant's farm that is not within Warren District's territorial boundary. At most, the Commission can only order Warren District to request the Warren County Judge/Executive to expand the water district's existing territorial boundary. If the County Judge/Executive declines to extend the boundaries for any reason, Warren District cannot serve Complainant's 70 acres.

Under the facts presented here, Complainant has not demonstrated an inability to obtain water and sewer service to the 70 acres of his farm outside the boundary of Warren District. At most, the evidence shows that service from BGMU is available, although it may be at a higher cost than from Warren District.

However, the Commission notes that Complainant retains the right to petition the Warren County/Judge Executive to expand the boundary of Warren District to include the back 70 acres of his farm. Therefore, it is unnecessary for the Commission to compel Warren District to request such action. The Complainant may petition the Warren County Judge/Executive for this relief.

Finally, the Commission finds that the Complaint can be fully adjudicated without having to determine whether the service agreement between BGMU and Warren District limits our authority under KRS 278.280 to extend service boundaries. We have determined that we lack the authority to unilaterally expand Warren District's territorial boundaries in this matter, and the evidence fails to demonstrate that the Complainant does not have an available remedy for obtaining water and sewer service to the 70

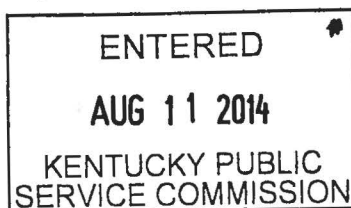
acres outside the boundary of Warren District. That remedy is to request water and sewer service from BGMU.

IT IS THEREFORE ORDERED that:

1. Complainant's request for an Order directing Warren District to petition the Warren County Judge/Executive to extend Warren District's territory to include the entirety of Complainant's farm is denied.

2. Complainant's request for an Order directing Warren District to extend water and sewer service to the portion of his farm that is not within Warren District's boundary is denied as beyond the Commission authority under KRS 74.110.

By the Commission



ATTEST:


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