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Writer's E-mail Address: kcarwell@elpolaw.com

March 13, 2013

Public Service Commission
P. O. Box 615
Frankfort, KY 40602-0615

Re: Roy G. Cooksey, M.D. v. and Warren County Water District

Gentlemen:

Enclosed are an original and nine copies of the "***Verified Petition of Roy G. Cooksey, M.D., to Require the Warren County Water District to Extend its Territory to Provide Sewer Service to His Farm.***"

Thank you for your assistance.

Very truly yours,

ENGLISH, LUCAS, PRIEST & OWSLEY, LLP

Keith M. Carwell

jhs
Enclosures
cc: Dr. Roy G. Cooksey
800 Wakefield
Bowling Green, KY 42101

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF

ROY G. COOKSEY, M.D.,
PETITIONER

VS. CASE NO. _____

WARREN COUNTY WATER DISTRICT,
DEFENDANT

VERIFIED PETITION OF ROY G. COOKSEY, M.D., TO REQUIRE THE WARREN COUNTY WATER DISTRICT TO EXTEND ITS TERRITORY TO PROVIDE SEWER SERVICE TO HIS FARM

Pursuant to KRS 278.260 and KRS 278.280, Roy G. Cooksey, M.D. ("Dr. Cooksey"), by counsel, hereby submits his Verified Petition to the Kentucky Public Service Commission for an order requiring Warren County Water District ("WCWD") to extend sewer service to that portion of his farm not currently served by Warren County Water District. In addition, Dr. Cooksey petitions for an order from this Commission to direct and require the Warren County Water District to file a petition with the Warren County Judge/Executive to amend the territorial limits of the Warren County Water District pursuant to KRS 74.110 in order that the

portion of Dr. Cooksey's farm not currently served by it will be included within its territorial limits.

Dr. Cooksey's farm, comprised of approximately 101 acres on Lovers Lane in Warren County, Kentucky, lies entirely outside the corporate limits of the City of Bowling Green, Kentucky. The property was acquired by Dr. Cooksey by deed dated 2 January 1976, of record in Deed Book 444, Page 19, in the office of the Warren County Clerk; a copy of that deed being annexed hereto marked **APPENDIX 1** and incorporated herein by reference. The deed itself is significant in that the property was acquired by Dr. Cooksey by one boundary and not in tracts, and it has not subsequently been subdivided in any manner. At the time Dr. Cooksey acquired the farm and for many years prior to that date, WCWD and its predecessor, Westside Water District, provided all water service to the entire farm. In fact, to this date, the only water service to the farm has been provided by WCWD which has both a ¾-inch and 8-inch water main on the farm. No other utility presently has or has ever provided water or sewer service to the farm.

Sewer service is, likewise, presently available on the farm from WCWD as a sewer line with manhole has been installed on the farm where it fronts Lovers Lane. No other utility has sewer service presently available to the farm and has never provided sewer service to the farm. Bowling Green Municipal Utilities' ("BGMU") closest sewer line is over 1,700 feet from the farm, and it currently has no easement which would provide it the right to install a sewer line to the farm.

In 1975, the current territorial boundaries of the Warren County Water District were established by the Warren Fiscal Court pursuant to KRS 74.110. At that time, though the entire farm was served by WCWD, the boundary line actually bisected the farm with absolutely no

rhyme nor reason. The boundary line was established arbitrarily by the surveyor—one can only assume in order that the boundary be a straight line. As a result of that action, 30 acres adjacent to Lovers Lane are within the WCWD current territorial limits, and the remaining rear 70 acres of the farm are outside the current WCWD territorial limits although WCWD remains the only utility providing water service to any portion of the farm. It is important to note that the farm lies in its entirety outside the city limits of Bowling Green, Kentucky and, therefore, outside the jurisdictional limits of BGMU. It is virtually a "no man's land" or island with respect to which neither utility currently has service nor jurisdiction to serve. At no time has any action been taken by BGMU to extend its territorial limits to include this 70 acres. Attached hereto marked **APPENDIX 2** and incorporated herein by reference is a plat reflecting the Cooksey farm and the current territorial limit line of WCWD which bisects it.

Dr. Cooksey currently has a barn on this rear 70-acre portion of his farm but is not able to provide water or restroom facilities to that barn as he has not been permitted to extend his existing WCWD waterlines or extend sewer service over this imaginary service line boundary. He has intermittently supplied water to the rear 70 acres by use of temporary service lines but has now been advised that this is no longer permitted. He has even been advised by BGMU representatives that he is not entitled to utilize a temporary line such as a hose to provide water for his cattle on the rear 70 acres or at the barn located thereon.

It might be argued by WCWD or BGMU, with respect to their service boundaries, that they entered into an agreement whereby they agreed that BGMU would provide service to this "no man's land." It is respectfully submitted that any such agreement is invalid as this property did not lie within the WCWD territorial limits. WCWD certainly did not have the power or

authority to cede to any other utility jurisdiction over the rear portion of the Cooksey farm or the right to serve that portion of the Cooksey farm. In addition, no legislative or administrative action has ever been taken to extend the territorial or jurisdictional boundaries of BGMU to include this property.

While the rear portion of Dr. Cooksey's farm lies outside the territorial limits of WCWD, the front portion lies within WCWD's territorial limits. The rear portion, as previously set forth, does not lie within the jurisdictional limits of any utility providing either water or sewer service. As a water district, WCWD has a legal duty to serve all within its territory if service can be reasonably extended. See OAG 75-719(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.") It is submitted that a voluntary agreement between BGMU and WCWD regarding the allocation of service area improperly limits this Commission's authority under KRS 278.280 to require WCWD to make extensions of service that are contrary to or inconsistent with such agreement.

KRS 278.280(3) specifically vests power in the Kentucky Public Service Commission to hear and determine the reasonableness of an extension when a person has come before this Commission and requested a reasonable extension. This fact situation presents the Commission with precisely the case which should be addressed by KRS 278.280(3). Here, we have a utility (WCWD) currently under the jurisdiction of this Commission which provides service to a portion of the farm but declines to provide service to the remaining portion of the farm which is immediately adjacent. Its reasons for declining service are that this portion of the farm is outside its territorial limits and that it has an agreement with BGMU that it will not do so. As

previously stated, it is the position of the Petitioner that any such agreement is invalid as there was no statutory or regulatory basis for WCWD to grant another utility (BGMU) authority to serve property which was not within WCWD's territorial limits.

A similar situation has arisen with respect to providing of electric service where this Commission did determine that extension of service lines to any portion of a tract owned by a single boundary to serve that owner would reasonably be concluded to be an ordinary extension. This decision of the Public Service Commission was upheld in ***Cumberland Val. R. E. Coop. Corp. v. Public Serv. Com'n***, 433 S.W.2d 103 (Ky. 1968) (**APPENDIX 3**). In that case, the appellate court stated:

> Under any normal circumstances, 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.

The Court went on to state importantly:

> 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.

As previously set forth above, the Cooksey farm is owned as a single boundary. See **APPENDIX 1.** Therefore, in accordance with the Court of Appeals' ruling cited above, it would certainly be reasonable to consider that the entire boundary is within the service area of WCWD.

No other sewer is reasonably available with BGMU sewer line over 1,700 feet away with an estimated cost in excess of $300,000 for installation, plus a $320,000 assessment for connection to BGMU. In order to install such a sewer line, it would also require Dr. Cooksey to obtain easements across adjacent property by agreement as he certainly does not have the right to

condemn. In the event BGMU attempted to utilize its right of condemnation, there may very well exist a question to be raised with the courts as to whether or not the condemnation was for a public purpose or necessary in view of the fact that adequate water and sewer could be obtained on the farm from WCWD.

In ***Carroll County Water District No. 1 v. Gallatin County Water District***, (Ky. Court of Appeals, April 23, 2010) **(APPENDIX 4),** the Court of Appeals, in an unpublished opinion, properly held that a utility does not have an exclusive right to serve its territory. The sole issue is whether a wasteful duplication of service results. The Court in that case determined there was none since there was no water service within the service area. This is precisely the case presently before this Commission. There is no sewer service in the immediate vicinity of the Cooksey property other than the sewer line of WCWD which is actually installed on the Cooksey farm. The extension of the existing water and sewer lines from the front 30 acres to the rear 70 acres would certainly not result in a wasteful duplication of service nor wasteful duplication of facilities.

The Public Service Commission has the authority to direct a water district to seek an expansion of existing boundaries to make reasonable extensions of service. ***Christian County Water District,*** Case No. 90-220 (Kentucky PSC February 20, 1991); ***Campbell County Kentucky Water District,*** Case No. 8505 (Kentucky PSC August 4, 1982).

BGMU may argue that by virtue of its agreements with WCWD, it has the exclusive right to serve this 70-acre tract; however, the Public Service Commission has recognized that no exclusive right to serve exists for water utilities. ***Auxier Water Company v. City of***

Prestonsburg, Case No. 96-362 (April 2, 1997); ***Kentucky Utilities Company v. Public Service Com'n***, Ky., 390 S.W.2d 168 (1965) (**APPENDIX 5**).

The fact situation set forth in this Petition is unique. Here we have a portion of a fairly small farm (101 acres) which has been arbitrarily bisected by the territorial boundary line of WCWD. There is no service to the rear portion by any other utility; and, in fact, no other utility even has lines on the property and, with respect to sewer lines, none other than WCWD has sewer service available within 1,700 feet of the subject property. The proposed extension of service will not compete or conflict with the facilities of other jurisdictional utilities and will not result in the wasteful duplication of facilities or inefficient investment. It is respectfully submitted that the Commission does have the authority to direct WCWD to make this reasonable extension of service and to seek the extension of its existing boundaries.

The core purpose of this Commission is to prevent unnecessary duplication of plans, facilities and services, and the extension by WCWD of its water and sewer facilities would accomplish this purpose.

WHEREFORE, Roy G. Cooksey, M.D., petitions the Public Service Commission for:

1. Entry of an order finding the requested extension of water and sewer service by Warren County Water District to the 70-acre portion of the farm owned by Roy G. Cooksey, M.D. to be an ordinary extension of such utility services in the usual course of business and a determination that the entire boundary is within the service area of WCWD;

2. Entry of an order directing and requiring Warren County Water District to file a petition with the Warren County/Judge Executive pursuant to KRS 74.110 to amend the

territorial limits of the Warren County Water District to include the entire boundary of the farm owned by Roy G. Cooksey, M.D.; and

3. For all other relief to which Roy G. Cooksey, M.D. may appear entitled.

This 13 day of March, 2013.

ENGLISH, LUCAS, PRIEST & OWSLEY, LLP
1101 College Street, P. O. Box 770
Bowling Green, Kentucky 42102-0770
Phone: (270) 781-6500
E-Mail: kcarwell@elpolaw.com
Attorneys for Roy G. Cooksey, M.D.

BY: _____
KEITH M. CARWELL

I, Roy G. Cooksey, M.D., certify that I have read the foregoing Verified Petition and state that to the best of my knowledge, information and belief all facts set forth therein are true.

_____
ROY G. COOKSEY, M.D.

COMMONWEALTH OF KENTUCKY

COUNTY OF WARREN

SUBSCRIBED AND SWORN TO before me by Roy G. Cooksey, M.D., on this 13 day of March, 2013.

_____
NOTARY PUBLIC, Ky. State-at-Large

My Commission Expires: 2-11-2014

This is to certify that the original and nine copies of the foregoing **VERIFIED PETITION OF ROY G. COOKSEY, M.D., TO REQUIRE THE WARREN COUNTY WATER DISTRICT TO EXTEND ITS TERRITORY TO PROVIDE SEWER SERVICE TO HIS FARM** was mailed to:

Public Service Commission
P. O. Box 615
Frankfort, KY 40602-0615

and a copy was mailed to:

Warren County Water District
Attention: Alan Vilines, General Manager
P. O. Box 10180
Bowling Green, KY 42102-4780

This 13 day of March, 2013.

KEITH M. CARWELL

1260489-6

Appendix

Tab 1

BOOK 444 PAGE 19

D E E D

THIS DEED OF CONVEYANCE, made and entered into this 2nd day of January, 1976, by and between Leonard Lawson and his wife, Bonnie Ann Lawson, hereinafter referred to as the GRANTORS, and Roy G. Cooksey, hereinafter referred to as the GRANTEE, 1851 Scottsville Rd. B.G. KY

W I T N E S S E T H

In consideration of the sum of one hundred sixty-two thousand dollars ($162,000.00), cash in hand paid, the receipt of which is hereby acknowledged the GRANTORS do hereby deed, bargain, sell, alien and convey unto the GRANTEE, his heirs and assigns forever, in fee simple absolute, a certain lot of land located approximately three miles southeast of Bowling Green, Warren County, Kentucky, and being more particularly described as follows:

Beginning at a stake on the northwest side of Lover's Lane 0.85 miles from the Cemetery Road and running S 35° 39 min. W 1,289.30 ft. to an iron post along the northwest right-of-way of said Lover's Lane, thence to the right N 63° 09 min. W 2,548.17 ft. to an iron post thence to the right N 10° 44 min. W 467.19 ft. to a fence post a corner common with the property of the Bowling Green-Warren County Airport, thence to the right N 26° 19 min. E 707.43 ft. to a fence post, thence N 34° 56 min. E 545.99 ft. to an iron post, a corner common to the Bowling Green-Warren County Airport property and the Nichols property, thence to the right S 66° 6 min. E 1,890.59 ft. to a fence post thence to the right S 24° 48 min. W 383.93 ft. to a fence post, thence to the right S 60° 03 E 1,059.95 ft. to the point of beginning, containing 102.54 acres.

This being the same property conveyed to Leonard Lawson and his wife, Bonnie Ann Lawson, by Hugh T. Howell and his wife, Ella C. Howell, and J. R. Bettersworth, Jr. and his wife, Gretchen Bettersworth by deed dated March 27, 1974, and recorded in Deed Book 430, page 158, in the office of the Clerk

of the Warren County Court.

TO HAVE AND TO HOLD the above-described real estate together with all the improvements thereon and all the appurtenances thereunto belonging, unto the GRANTEE, his heirs and assigns forever, with covenant of general warranty of title.

Witness the hands of the GRANTORS this the date and day first-above written.

JAN 2 '78

Leonard Lawson

Bonnie Ann Lawson

Commonwealth of Kentucky)
) ss.
County of Warren)

I, Robert D. Simmons, a notary public in and for the state and county aforesaid, do hereby certify there appeared before me this date Leonard Lawson and his wife, Bonnie Ann Lawson, both known to me personally who executed the foregoing deed of conveyance and acknowledged same to be their free act and deed.

This 2nd day of January, 1976.

Notary Public, Kentucky at Large

My commission expires 3/29/78.

This instrument prepared by
Robert D. Simmons, Attorney
at Law, 1032 College Street
Bowling Green, Kentucky 42101

Robert D. Simmons

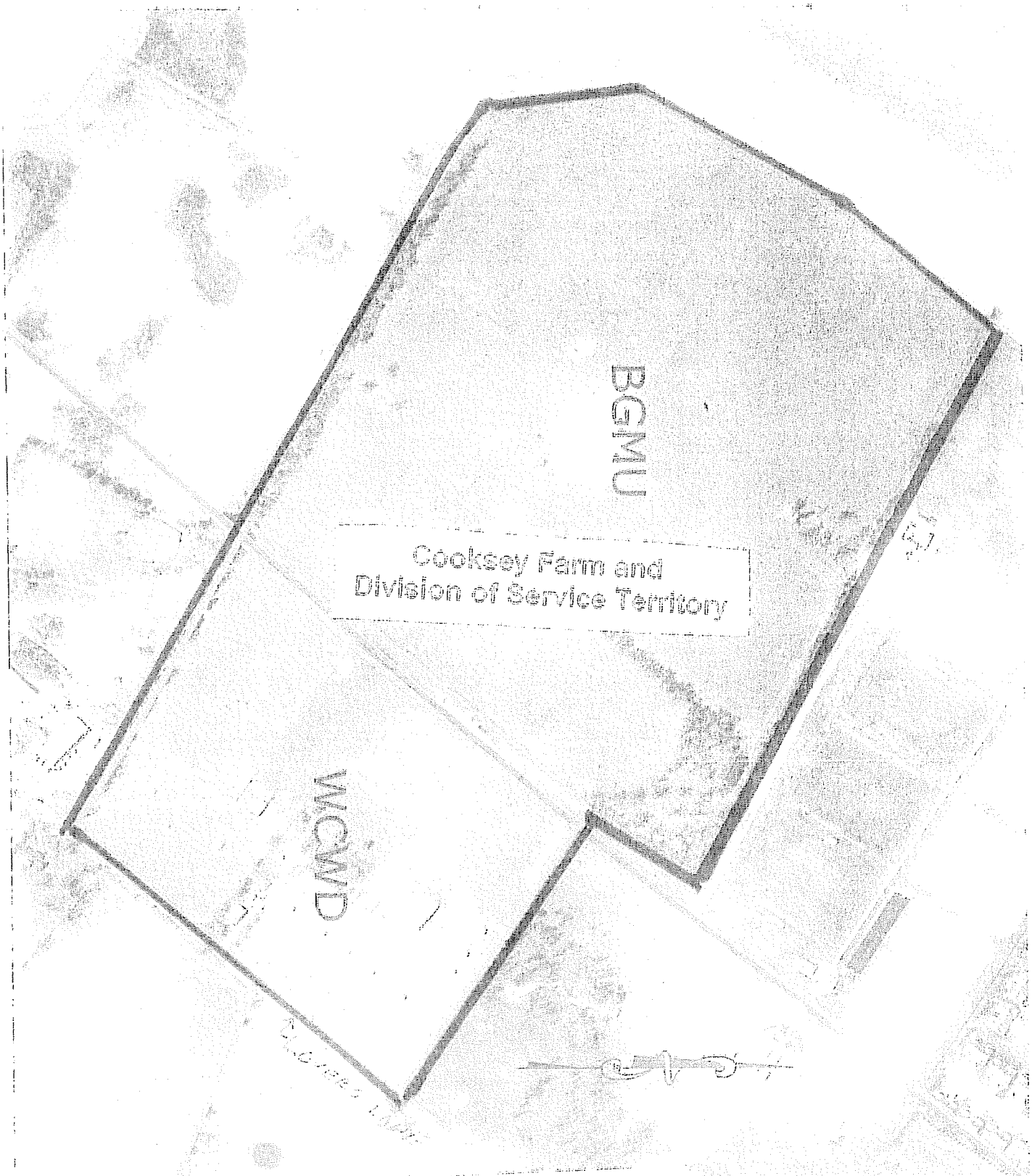
STATE OF KENTUCKY }
COUNTY OF WARREN } SS

I, CHARLES W. [illegible], Clerk of Warren County Court, do certify that the foregoing [illegible] was this day lodged to be and is with this and the foregoing certificate duly recorded. Given under my hand this 2 day of January, 1976

CHARLES W. [illegible], CLERK

By [illegible] D. C.

Tab 2



APPENDIX 2-A

BOWLING GREEN
WARREN COUNTY
REGIONAL AIRPORT
Cooksey Farm
City Limits
CUMBERLAND TRACE RD
INDUSTRIAL PARK
WARREN COUNTY BOARD OF EDUCATION
CAMPBELL LN
FAIRVIEW AV
31W BYPASS
BROADWAY
CHESTNUT ST
234
880
251
2629

APPENDIX 2-B

Tab 3

CUMBERLAND VALLEY RURAL ELECTRIC COOPERATIVE CORPORATION, Appellant,

v.

PUBLIC SERVICE COMMISSION of Kentucky: City of Jellico, Tennessee, and Cal-Glo Coal Company, Inc., Appellees.

Court of Appeals of Kentucky.

Oct. 18, 1968.

Plaintiff filed complaint with Public Service Commission against utility and consumer alleging that they had illegally invaded plaintiff's service area. The Public Service Commission dismissed the complaint, and an appeal was taken. The Circuit Court, Franklin County, Henry Meigs, J., affirmed, and plaintiff appealed. The Court of Appeals, Cullen, C., held that even if power line from coal tipple to mine could be considered line through which utility was serving public, it was an ordinary extension of existing system in the usual course of business and utility was not required to obtain certificate of convenience and necessity.

Judgment affirmed.

1. Electricity ⇨9(2)

Even if power line could be considered consumer's line, consumer was not required to obtain a certificate of public convenience and necessity when it did not construct line to serve public but only itself. KRS 278.020, 278.430.

2. Electricity ⇨9(2)

Even if power line from coal tipple to mine could be considered line through which utility was serving public, it was an ordinary extension of supplier's existing system in the usual course of business where the existing system extended to and on coal company's boundary, and utility was not required to obtain certificate of convenience and necessity. KRS 278.020, 278.430.

3. Public Service Commissions ⇨6.6

If a utility has been rendering service to a tract of land owned as a single boundary, normally an extension of the service lines to any point in boundary to serve an owner or tenant would reasonably be considered to be an ordinary extension in usual course of business. KRS 278.020, 278.430.

4. Appeal and Error ⇨172(1)

Where plaintiff did not make allegation in its complaint that supplier's rendering power service to consumer violated TVA Act of 1959, argument was not before Court of Appeals for review. KRS 278.020, 278.430; Tennessee Valley Authority Act of 1933, §§ 1 et seq., 15d as amended 16 U.S.C.A. §§ 831 et seq., 831n–4.

Philip P. Ardery, Brown, Ardery, Todd & Dudley, Louisville, for appellant.

J. Gardner Ashcraft, Frankfort, for Public Service Commission of Kentucky.

Sutton & Forcht, Williamsburg, E. Gaines Davis, Jr., Smith, Reed, Yessin & Davis, Frankfort, for City of Jellico, Tennessee and Cal-Glo Coal Co., Inc.

CULLEN, Commissioner.

Cumberland Valley Rural Electric Cooperative Corporation filed a complaint with the Public Service Commission of Kentucky, against Jellico Tennessee Electric and Water System and Cal-Glo Coal Company, alleging that Jellico and Cal-Glo had illegally invaded the service area of Cumberland and had violated KRS 278.020 in constructing an electric transmission line without a certificate of convenience and necessity. The Public Service Commission dismissed the complaint, and upon appeal by Cumberland to the Franklin Circuit Court judgment was entered affirming the order of the commission. Cumberland has appealed here from that judgment.

On this appeal Cumberland argues only the two points that the construction of the transmission line by Jellico and Cal-Glo was illegal in the absence of a certificate of convenience and necessity under KRS 278.020, and that the rendering of electric service by Jellico to Cal-Glo violates the TVA Act of 1959.

The City of Jellico, Tennessee, for many years has operated an electric system using TVA power. For more than 20 years prior to 1967 it had rendered service to Gatliff, Kentucky, under certificates of public convenience and necessity from the Kentucky Public Service Commission. Its service lines extended to a coal tipple located on a 15,000-acre boundary owned by the Gatliff Coal Company and the Gatliff Heirs. The tipple was near the southern end of the boundary. The service to the tipple was three-phase.

The Cumberland Co-op was rendering single-phase service in an area to the northeast of the Gatliff boundary, and one of its lines extended to within a few hundred feet of the boundary.

In 1967 the Gatliff interests leased an area in the northeast part of its boundary to Cal-Glo, for a proposed new mine. Cal-Glo then entered into arrangements with Jellico pursuant to which Cal-Glo, at its own expense, constructed a transmission line running from the new mine location to the tipple at Gatliff, Kentucky, a distance of 2.7 miles, on and through the Gatliff boundary. Jellico agreed to provide electric power at the point of connection with its lines, at the tipple, with the restriction that the service would be exclusively for the Cal-Glo mine and Cal-Glo could not sell power from the line to anyone else.

Cumberland argues that either Cal-Glo or Jellico was required to obtain a certificate of convenience and necessity for construction of the line from the tipple to the new mine, under KRS 278.020. That statute provides, in pertinent part, that no person shall begin the construction of any facility "for furnishing to the public" a utility service, "except ordinary extensions of existing systems in the usual course of business," unless the person has obtained a certificate of convenience and necessity.

[1] If the line in question be considered Cal-Glo's line it is clear that Cal-Glo was not required to obtain a certificate, because it did not construct the line to serve the *public* and it does not intend to serve the public.

[2,3] On the other hand, if the line be considered Jellico's line, through which Jellico is serving the public in the form of Cal-Glo as a consumer, we think it properly may be considered that the line is an ordinary extension of Jellico's existing system in the usual course of business. Jellico's existing system extended to and upon the Gatliff boundary. Under any normal circumstances, 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. (The ownership serves as an area-defining factor.) The only complicating feature of the instant case arises from the fact that the tract is so large—15,000 acres. The Public Service Commission apparently was of the opinion that the size of the tract was not a basis for a distinction. Under KRS 278.430 the power of the courts to set aside an order of the Public Service Commission is limited to cases in which the court finds that the action of the commission was unreasonable or unlawful. We cannot say that the commissioner's determination in the instant case was unreasonable or unlawful.

[4] The argument in this court that the rendering of service by Jellico to Cal-Glo violates the TVA Act of 1959 is not well taken, because no such allegation was made

by Cumberland in its complaint to the Public Service Commission. In substance, the argument is that the Gatliff tipple area was not an area in which Jellico was the "primary source of power supply" in 1957 within the meaning of Section 15d of the TVA Act, 16 U.S.C. § 831n–4. This involves a factual question which the Public Service Commission was not asked to determine. Cumberland says here, in its brief, that the TVA Board has made no formal declaration that the Gatliff area was one in which Jellico was the primary source of supply in 1957. We need not consider whether such a declaration is necessary under the TVA Act because the Public Service Commission was not asked to find that such a declaration was or was not made.

The judgment is affirmed.

All concur.

LOUISVILLE WATER COMPANY, Inc., Appellant,

v.

Allan F. BOSLER et al., Appellee.

Court of Appeals of Kentucky.

Oct. 11, 1968.

As Corrected Nov. 6, 1968.

Action was brought against defendant water company for damage to merchandise of plaintiff by water from break in one of defendant's water mains at intersection of streets in city. The Common Pleas Branch, First Division, Jefferson County, James S. Shaw, J., rendered judgment against defendant, and defendant appealed. The Court of Appeals, Palmore, J., held that evidence was sufficient to warrant submission to jury of question whether defendant's negligence caused break in water main.

Judgment affirmed.

1. Waters and Water Courses ⇐209

Evidence was sufficient to warrant submission to jury of question whether defendant water company, whose water main broke and allowed water to escape and damage merchandise of plaintiff, was negligent.

2. Waters and Water Courses ⇐209

In action against defendant water company for damage to plaintiff's merchandise which was damaged by water as result of break in water main at intersection, it was not error for trial court to admit evidence of previous breaks of other water mains in the immediate area.

Louis N. Garlove, Carl J. Bensinger, Morris, Garlove, Waterman & Johnson, Louisville, for appellant.

William Mellor, Louisville, for appellees.

PALMORE, Judge.

Louisville Water Company, Inc., appeals from a judgment entered on a verdict awarding Allan F. and Georgia C. Bosler, d/b/a George Bosler Leather Company, $7,834.69 for damage done to a stock of merchandise by water from a break in one of the water company's mains at the intersection of Market and Second Streets in Louisville on December 19, 1963.

[1] The question is whether there was sufficient proof that the break resulted from the water company's negligence to warrant submission to the jury. We have concluded that there was.

All of the evidence upon which it would be necessary to predicate liability was obtained from Byron E. Payne, the water company's chief engineer and superintendent, first by interrogatories and then

Tab 4

RENDERED: APRIL 23, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000864-MR

CARROLL COUNTY WATER
DISTRICT NO. 1. — APPELLANT

v.

APPEAL FROM GALLATIN CIRCUIT COURT
HONORABLE JAMES R. SCHRAND II, JUDGE
ACTION NO. 08-CI-00194

GALLATIN COUNTY JUDGE/EXECUTIVE;
GALLATIN COUNTY WATER DISTRICT;
TOMMY CRAWFORD; JOHN ZALLA;
LOVE'S TRAVEL STOPS & COUNTRY
STORE, d/b/a/ LOVE'S TRAVEL STOP #383;
AND WHITEHORSE DEVELOPMENT
GROUP, LLC. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND NICKELL, JUDGES; KNOPF,[1] SENIOR JUDGE.

CLAYTON, JUDGE: This is an appeal of a decision of the Gallatin Circuit Court regarding an order of the Gallatin County Judge/Executive. Based upon the following, we affirm the decision of the trial court.

BACKGROUND INFORMATION

Carroll County Water District No. 1 (CCWD) is a public water district which originally operated in Carroll County. In 1984, however, it began to operate in Gallatin County as well. To facilitate operations in Gallatin, CCWD constructed a new water tank, booster pumps and water lines. These improvements were financed through the issuance of a bond in the amount of approximately $1,208,000. The bond was issued through the United States Department of Agriculture's Farmers Home Administration, now the Rural Development Office, (USDA).

CCWD contends that it depends upon its existing water revenues as well as potential revenues from new customers to pay the debt owed to the USDA. Since CCWD operates in portions of Carroll, Owen and Gallatin counties, it was created by a joint order of the three counties by the County Judge/Executives located within each county.

In 1960, the Gallatin Fiscal Court established the Gallatin Rural Water District (GRWD). In September of 1998, Carroll, Owen and Gallatin Fiscal Courts

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

realigned CCWD's boundaries. The realignment in 1998 was at the request of the Gallatin Fiscal Court. CCWD asserts that this was to eliminate the area of the Kentucky Speedway from its district.

In 2002, Gallatin County Water District (GCWD) constructed an eight-inch water line from the Kentucky Speedway through CCWD's territory. This was done without first obtaining a Certificate of Public Convenience and Necessity (Certificate of Necessity). CCWD asserts that this was to service a proposed Love's Travel Stop at the intersection of I-71 and Kentucky Highway 1039. CCWD contends that this property was located within its territorial boundaries and that the anticipated revenues were what motivated GCWD to act as it did.

CCWD filed a complaint with the Public Service Commission (PSC). On July 8, 2008, Gallatin County Judge/Executive Kenny French ordered that:

> The Gallatin County Water District's territory limits will now include the area as advertised and more clearly stated as follows: All areas along Speedway Blvd. (a.k.a. Jerry Carroll Blvd.) from KY 35 to KY 1039 and extending along the same projected line to a point 1000 ft. west of the junction of KY 1039 and Speedway Blvd., thence southwestwardly course to I-71, AND including all of Gallatin County south of I-71 from KY 35 and the Carroll County line; excluding any existing customers as of April 1, 2008.

The PSC ruled on CCWD's complaint and did not allow GCWD to sell water within the area complained of until it applied for and received a Certificate of Necessity. The PSC order dated September 15, 2008, stated:

> To the extent a water district lacks the legal authority to construct facilities outside its [territorial] boundaries to serve persons outside these boundaries, it cannot demonstrate a need for such facilities or an absence of wasteful investment. . . . Moreover, the construction of facilities to serve extra-territorial areas would result in wasteful duplication, as those facilities cannot lawfully be used to serve their intended customers.

CCWD brought an action in Gallatin's Circuit Court attempting to negate the order of the Gallatin County Judge/Executive. The trial court held that the Judge/Executive's order was proper.

This action arose from the CCWD's appeal of the order of the Gallatin County Judge/Executive. The Gallatin Circuit Court upheld the order and this appeal followed.

DISCUSSION

Appellants first contend that CCWD has the exclusive right to provide water service within its service territory. "[A] fiscal court may create a water district in accordance with the procedures of KRS 65.810." KRS 74.010. KRS 74.012 requires:

> (1) Prior to the establishment of any water district as provided by KRS 74.010, and prior to the incorporation or formation of any nonprofit corporation, association or cooperative corporation having as its purpose the furnishing of a public water supply (herein referred to as a "water association"), a committee of not less than five (5) resident freeholders of the geographical area sought to be served with water facilities by the proposed district or the proposed water association shall formally make application to the Public Service Commission of Kentucky in such manner and following such procedures

as the Public Service Commission may by regulation prescribe, seeking from the commission the authority to petition the appropriate county judge/executive for establishment of a water district, or to proceed to incorporate or otherwise create a water association. The commission shall thereupon set the application for formal public hearing, and shall give notice to all other water suppliers, whether publicly owned or privately owned, and whether or not regulated by the commission, rendering services in the general area proposed to be served by said water district or water association, and to any planning and zoning or other regulatory agency or agencies with authority in the general area having concern with the application. The commission may subpoena and summon for hearing purposes any persons deemed necessary by the commission in order to enable the commission to evaluate the application of the proponents of said proposed water district or water association, and reach a decision in the best interests of the general public. Intervention by any interested parties, water suppliers, municipal corporations, and governmental agencies shall be freely permitted at such hearing.

(2) The public hearing shall be conducted by the commission pursuant to the provisions of KRS 278.020. At the time of the hearing, no employment of counsel or of engineering services shall have been made to be paid from water district funds, water association funds, or made a charge in futuro against water district or water association funds, if formation of such water district or water association is permitted by the commission.

(3) Before the Public Service Commission shall approve any application for creation of a water district or water association, the commission must make a finding and determination of fact that the geographical area sought to be served by such proposed water district or water association cannot be feasibly served by any existing water supplier, whether publicly or privately owned, and whether or not subject to the regulatory jurisdiction of the commission. If it shall be determined that the geographical area sought to be served by the proposed

> water district or water association can be served more feasibly by any other water supplier, the commission shall deny the application and shall hold such further hearings and make such further determinations as may in the circumstances be appropriate in the interests of the public health, safety and general welfare.
>
> (4) Any order entered by the commission in connection with an application for creation of a water district or water association shall be appealable to the Franklin Circuit Court as provided by KRS 278.410.

The appellant argues that the provisions of KRS Chapter 74, when read as a whole, give a comprehensive plan by which the legislature intended a water district to have that would provide it with the territorial integrity necessary to operate. It contends that the statutory provisions indicate that the legislature intended the water district to be granted an exclusive service area in which to provide water.

The PSC order dated September 15, 2008, opined as follows:

> The Commission's powers are purely statutory. We possess only those powers that are conferred expressly or by necessary or fair implication. As water districts are utilities, Carroll District and Gallatin District are subject to our jurisdiction. Our jurisdiction extends to "all utilities in this state" and is exclusive "over the regulation of rates and service of utilities." We further have the statutory duty to enforce the provisions of KRS Chapter 278.
>
> Except in the provision of retail electric service, the Commission lacks the authority to establish an exclusive service territory. Kentucky courts have

> previously held that utilities do not "have any right to be free of competition." The Commission has applied this principle to water and other types of utilities.
>
> While the Commission lacks any authority to establish an exclusive service territory for water utilities, we clearly possess the authority to consider competing utilities' claims to provide service to a prospective customer to prevent wasteful duplication of facilities or excessive investment. KRS 278.020 limits the construction that a utility may undertake without obtaining prior Commission approval in the form of a Certificate.

The PSC found that it was a wasteful duplication to have GCWD provide water in an area where CCWD already provided service. The Gallatin Circuit Court, however, held differently:

> The courts have looked at cases where a municipality seeks to provide service to an area that is within the service area of a water district. The Kentucky Court of Appeals held that, "Surely if the legislature intended a water district to have an exclusive right, it would have so provided." *City of Cold Spring v. Campbell County Water Dist.*, 334 S.W.2d 269, 273 (Ky. 1960), *overruled on other grounds by*, *City of Georgetown v. Public Service Commission*, 516 S.W.2d 842 (Ky. 1974). The Court further added that "[t]he statutes do not grant to water districts exclusive authority to operate in the territory comprising the district." *City of Cold Spring*, 334 S.W.2d at 274. Although the issue in that case dealt with a conflict between municipalities and the water district, the Court does not find CCWD has the exclusive right to provide water service within its service territory.
>
> As to this issue of territorial boundaries, the trial court

found that:

> GCWD does not seek to absorb CCWD or any of the customers that CCWD currently serves, GCWD is only

> seeking to expand its territory, albeit into the territory of another water district. So, GCWD may expand its territory, but it cannot "take over" the territory already occupied by CCWD. The two water districts would share the territory and the Public Service Commission would assign the appropriate district to provide water.

We agree with the trial court that the CCWD did not prove that the GCWD was infringing on its territorial rights by servicing the property. Even according to the PSC, there does not exist a right to an "exclusive territory" for water service. Instead, there should not be a "wasteful duplication of services." In this case, there was not as there was no service within the subject area.

Next, appellants argue that the trial court erred by failing to give federal law precedence. 7 U.S.C.A. § 1926(25)(C)(b) provides that:

> The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

In *Le-Ax Water Dist. V. City of Athens, Ohio*, 346 F.3d 701, 705 (6th Cir. 2003), the Sixth Circuit Court of Appeals held that the above statute:

> prevents local governments from expanding into a rural water association's area and stealing its customers; the legislative history states that the statutory provision was intended to protect "the territory served by such an association facility against [other] competitive facilities" such as local governments, as otherwise rural water

> service might be threatened by "the expansion of the boundaries of municipal and other public bodies into an area served by the rural system."

We agree with the trial court that in order to prevail under 7 U.S.C.A. § 1926(25) (C)(b), the appellant would have to establish that: "1) it is an 'association' within the meaning of the Act; 2) it has a qualifying outstanding FmHA loan obligation; and 3) it has provided or made service available in the disputed area." *Adams County Regional Water Dist. v. Village of Manchester, Ohio*, 226 F.3d 513, 517 (6th Cir. 2000). The trial court found that CCWD did not meet the third factor.

The trial court found that the third prong is interpreted to mean that the water district must have a legal duty to service the area and be prepared to do so. While the court found CCWD had the legal duty, it also found (as did the Gallatin County Judge/Executive) that it was not prepared to so service. We agree. The Sixth Circuit has held that:

> [W]hether an association has made service available is determined based on the existence of facilities on, or in the proximity of, the location to be served. If an association does not already have service in existence, water lines must either be within or adjacent to the property claimed to be protected by Section 1926(b) prior to the time an allegedly encroaching association begins providing service in order to be eligible for Section 1926(b) protection.

Lexington-South Elkhorn Water Dist. v. City of Witmore, Ky., 93 F.3d 230, 237 (6th Cir. 1996). The trial court appropriately applied Federal law and determined that

CCWD was not in a position to supply water to the affected area. Thus, it was not an encroachment for the GCWD to provide water to the area.

Finally, the appellant contends that the findings of the appellee Gallatin County Judge/Executive were not supported by the evidence at the hearing. The appellant contends the following errors in the findings of the Judge/Executive:

1. The area (in dispute) was served by Gallatin Water District at the time the first public notice was advertised in the Gallatin County News on April 16, 2008;
2. GCWD has provided service for several years to the territory in question without objection;
3. CCWD #1 does not have the current capacity;
4. The existing new water user in the area has requested water service by the GCWD;
5. Allowing the area to be served by (CCWD) will hinder and delay . . . beneficial effects (to Gallatin County);
6. The only debt incurred by (CCWD) in the described area is that associated with the recent extension of lines to serve Love's Truck Stop.

We find nothing in these facts which would indicate the trial court erred in affirming the order of the Judge/Executive. Thus, we affirm the decision of the trial court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Ruth H. Baxter
Carrollton, Kentucky

BRIEF FOR APPELLEE,
GALLATIN COUNTY WATER
DISTRICT:

Rhonda W. Huddleston
Warsaw, Kentucky

BRIEF FOR APPELLEE,
GALLATIN COUNTY
JUDGE/EXECUTIVE:

John G. Wright
Warsaw, Kentucky

NO BRIEF FILED FOR APPELLEE,
TOMMY CRAWFORD.

NO BRIEF FILED FOR APPELLEE,
JOHN ZALLA.

NO BRIEF FILED FOR APPELLEE,
LOVE'S TRAVEL STOPS &
COUNTRY STORE, d/b/a/ LOVE'S
TRAVEL STOP #383

NO BRIEF FILED FOR APPELLEE,
WHITEHORSE DEVELOPMENT
GROUP, LLC.

Tab 5

[3] The third and final ground urged by appellant for reversal complains of the competency of evidence of witnesses who admitted they did not know the meaning of "market value." As we have many times observed in such a situation, lay witnesses cannot be expected to give a legal definition of "fair market value." It is common practice for one of the attorneys or the court to define for a prospective witness the meaning of fair market value. The testimony of these witnesses clearly indicates that they had had considerable experience in real estate transactions, especially in this locality, and that they showed considerable common sense and practicality concerning the subject about which they testified. We cannot agree that this testimony should have been taken from the jury. Commonwealth, Department of Highways v. Citizens Ice & Fuel Company, Ky., 365 S.W.2d 113 (1963).

The judgment is reversed with directions to grant appellant a new trial.

KENTUCKY UTILITIES COMPANY et al., Appellants,

v.

PUBLIC SERVICE COMMISSION of Kentucky, et al., Appellees.

Court of Appeals of Kentucky.

Feb. 26, 1965.

Rehearing Denied June 4, 1965.

The Public Service Commission granted certificate of convenience and necessity to rural cooperative which projected building of generating plant with capability of 75,000 KW and construction of allied facilities. The order was upheld by the Circuit Court, Franklin County, Henry Meigs, J., and protestant utilities appealed. The Court of Appeals, Cullen, C., held that finding of public service commission of inadequacy of existing service in area in which rural cooperative proposed to build plant because ordinary extensions of existing systems in area would not supply the deficiency was supported by evidence.

Affirmed.

1. Electricity ⇨4

Alternative test of "inadequacy" of electrical service is a substantial deficiency of service facilities beyond what could be supplied by normal improvements in ordinary course of business, and deficiency is not to be measured by needs of the particular instant but by the needs immediately foreseeable. KRS 279.010 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

2. Electricity ⇨4

"Immediately foreseeable needs" in determination whether or not electrical service facilities in area are inadequate, in view of substantial period of time required to construct and place in operation major electrical service facility, may embrace a number of years as immediately foreseeable future.

See publication Words and Phrases for other judicial constructions and definitions.

3. Electricity ⇨4

Finding of Public Service Commission of inadequacy of existing electric service in area in which rural cooperative proposed to build plant with capability of 75,000 KW because ordinary extensions of existing systems in area would not supply the deficiency was supported by evidence. KRS 278.020, 279.010 et seq.

4. Electricity ⇨4

Proceeding before Public Service Commission by rural cooperative to secure certificate of convenience and necessity authorizing construction of generating plant

with capability of 75,000 KW and allied facilities was not premature on basis that third of its three members would not be furnished energy until 1969 while other two members were to be furnished energy in 1966 where any resulting temporary excess capacity of plant could be utilized by existing utilities in area.

5. Electricity ⇐4

Finding of public service commission that rural cooperative which projected generating plant with capability of 75,000 KW and which would initially have but one interconnection with source of emergency power and peaking power was not in serious danger of complete failure of service whereby its system would be insufficiently dependable for lack of reserve power was supported by evidence. KRS 278.020, 279.010 et seq.

6. Electricity ⇐4

Rural cooperative which projected building of generating plant with capability of 75,000 KW did not lack an overall feasibility on basis that it could not supply power at cost as low as that of existing utilities where evidence warranted finding that cost of cooperative's power would be substantially lower than costs of power supplied by existing utilities and cooperative's rates would be reasonable on basis of any appropriate standard. KRS 278.020, 279.010 et seq.

7. Electricity ⇐4

Fact that feasibility of projected construction of rural cooperative rested upon power load study testified about by witness although study had not been prepared by him or by persons working under his supervision did not vitiate showing as to overall feasibility of project where study was addressed to showing existence of sufficient customer market and sufficient customer market had been established. KRS 278.020, 279.010 et seq.

8. Public Service Commissions ⇐6.7

"Wasteful duplication," as applied to public service systems or facilities, embraces an excess of capacity over need, an excessive investment in relation to productivity or efficiency, or an unnecessary multiplicity of physical properties. KRS 278.020, 279.010 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

9. Electricity ⇐4

Where evidence indicated that there was no excess of capacity over need in area in which rural cooperative projected building generating plant with capability of 75,000 KW and that main transmission lines of existing utilities would have to use their full capacity without serving member cooperatives to which plant would distribute energy, construction of plant would not result in "wasteful duplication." KRS 278.020, 279.010 et seq.

10. Electricity ⇐4

Evidence warranted finding that construction of rural cooperative generating plant with capability of 75,000 KW would not result in duplication from standpoint of excessive investment.

11. Electricity ⇐4

Whether, in overall public interest, competition between publicly and privately owned power facilities has advantages that offset those of monopoly is question that legislature has left to decision of the Public Service Commission. KRS 278.020, 279.010 et seq.

12. Electricity ⇐4

That alleged significant additional cost to customers of existing utility would result from construction and operation of rural cooperative's 75,000 KW capability generating plant and that such additional cost would cause unjustified economic waste did not establish basis for delaying con-

struction of cooperative's plant where existing utility's claimed loss was attributable to terms of contract with second utility. KRS 278.020, 279.010 et seq.

13. Electricity ⇐4

Order of public service commission granting certificate of convenience and necessity to rural cooperative which projected construction of generating plant with capability of 75,000 KW and construction of allied facilities embodied all essential findings of fact and applied proper standards. KRS 278.020, 279.010 et seq.

14. Electricity ⇐4

Public service commission is authorized to grant certificate of convenience and necessity to new supplier of electricity if supplier's proposal is feasible in showing capability to supply adequate service at reasonable rates and if granting of certificate to new supplier will not result in wasteful duplication with facilities of existing utilities. KRS 278.020, 279.010 et seq.

15. Electricity ⇐4

Existing utilities have no absolute right to supply inadequacy of electrical service. KRS 278.020, 279.010 et seq.

16. Public Service Commissions ⇐6.6

Existing utilities do not have right to be free of competition. KRS 278.020, 279.010 et seq.

Malcolm Y. Marshall, Ogden, Robertson & Marshall, Louisville, Clifford E. Smith, Smith, Reed, Yessin & Davis, Frankfort, William L. Wilson, Wilson & Wilson, Owensboro, for appellants.

J. Gardner Ashcraft, Public Service Comm., Louis Cox, Hazelrigg & Cox, Frankfort, Julian M. Carroll, Emery & Carroll, Paducah, for appellees.

CULLEN, Commissioner.

The appeal is from a judgment of the Franklin Circuit Court upholding an order of the Public Service Commission granting a certificate of convenience and necessity to Big Rivers Rural Electric Cooperative Corporation (hereinafter "Big Rivers") for the construction of certain electric generating and transmission facilities, and granting authority to borrow money from a federal agency for the cost of the facilities. The appellants, who were protestants in the proceedings before the Public Service Commission, are Kentucky Utilities Company (hereinafter "KU"), Louisville Gas and Electric Company (hereinafter "LG&E"), City Utility Commission of the City of Owensboro (hereinafter "OMU"), and the City of Owensboro.

Big Rivers was organized in 1961 under KRS Chapter 279 for the purpose of generating and transmitting electric energy for its members, which are the following three rural electric cooperatives which for a number of years have been distributing electric energy in western Kentucky: Henderson-Union Rural Electric Cooperative Corporation (hereinafter "Henderson-Union"), Green River Rural Electric Cooperative Corporation (hereinafter "Green River"), and Meade County Rural Electric Cooperative Corporation (hereinafter "Meade County").

Big Rivers' application to the Public Service Commission was made in 1962. It sought a certificate of convenience and necessity authorizing: (1) The construction of a steam generating plant with a capability of 75,000 KW, designed to supply the generating needs of Henderson-Union and Green River commencing in 1966, and the needs of Meade County commencing in 1969; (2) the construction of transmission lines from the generating plant to the lines or load centers of Henderson-Union and Green River, to commence service in 1966; and (3) an interconnection line between its generating plant and power-producing facilities of South-

eastern Power Administration (hereinafter "SEPA") at Barkley Dam, also to commence service in 1966. The application also sought an authorization to borrow the cost of the proposed system ($18,000,000) from a federal agency. The application was granted by the Public Service Commission as made.

At the time the application was made Henderson-Union and Green River were being supplied with power by KU, and Meade County was being supplied by LG&E. Henderson-Union and Green River were in a position to, and did, make commitments with Big Rivers to buy power from Big Rivers commencing in 1966, but Meade County had a contract with LG&E extending through 1968, so it could make no commitments with Big Rivers for service prior to 1969. However, Meade County did enter into a contract with Big Rivers to buy power commencing in 1969. The capacity of the proposed generating plant of Big Rivers is designed to accommodate the needs of Meade County, but no authority was sought in the instant proceeding to construct transmission lines to serve Meade County.

The most vigorous attack of the appellants is upon the finding of the Public Service Commission that there is an inadequacy of existing service. However, applying to the facts of this case the principles enunciated in Kentucky Utilities Co. v. Public Service Commission, Ky., 252 S.W.2d 885 (hereinafter "East Kentucky"), we conclude that the attack must fail.

[1, 2] One of the alternative tests of inadequacy stated in East Kentucky is "a substantial deficiency of service facilities, beyond what could be supplied by normal improvements in the ordinary course of business" (252 S.W.2d @ 890). The deficiency is not to be measured by the needs of the particular instant, but by "immediately foreseeable needs" (252 S.W.2d @ 893). Clearly, in view of the substantial period of time required to construct and place in operation a major electric service facility, the immediately foreseeable future may embrace a number of years. We said, in East Kentucky (252 S.W.2d @ 893):

> "Perhaps the strongest proof of inadequacy of present facilities is found in the proposed eight-year expansion plan of K.U., filed with the Public Service Commission in connection with hearings in this case, which calls for increasing the capacity of the generating plants of K.U. by some 300,000 KW, and for the construction of additional transmission lines. This plan, based on anticipated load growths, is a clear admission of the inadequacy of existing facilities to supply immediately foreseeable needs."

In the instant case the evidence showed that KU planned to add 165,000 KW of generating capacity in 1967, and another 165,000 KW in 1970, or a total of 330,000 KW in a period of eight years from the date of Big Rivers' application, or four years from the date of Big Rivers' proposed commencement of operations. In addition, LG&E will need an additional 180,000 KW unit in 1966, and OMU plans to add a 151,000 KW unit in 1968. Actually, the 10-year programs of the protesting utilities, taken together, call for the adding of 1,700,000 KW of generating capacity. KU states that its proposed new 165,000 KW unit planned for 1967 will be necessary whether or not the Big Rivers plant is built.

The situation with respect to needs of the immediate future for transmission facilities is similar. For example, KU planned substantial extensions of its transmission facilities, in the West Kentucky area, by 1968. New load centers will require service, and many existing load centers do not have direct power delivery.

The appellants maintain that their planned additions of generating and transmission facilities should be classed as "normal improvements in the ordinary course of business." However, they concede that they would be required to obtain certificates

of convenience and necessity for the construction of these facilities, which concession puts them in an untenable position, because under KRS 278.020 a certificate is not required for the construction of "ordinary extensions of existing systems in the usual course of business." In our opinion major facilities of the size contemplated cannot be considered to be mere ordinary extensions or normal improvements within the meaning of the statute or within the meaning of the rule laid down in East Kentucky.

[3] Actually, everyone in this case agrees that the existing service facilities are inadequate to meet the needs of the immediately foreseeable future. Although the appellants undertake to argue that there is no inadequacy, the real import of their argument is that the existing utilities, rather than a newcomer, should be allowed to supply the inadequacy. The question of who should be permitted to supply the inadequacy is involved in this case, in the overall consideration of public convenience and necessity, but the fact that the existing utilities are willing and able to supply the inadequacy by major additions to plant does not negative the existence of the inadequacy.

As their second argument, the appellants maintain that the proceedings before the Public Service Commission were premature and should have been dismissed because (1) the Big Rivers plant will not be economically feasible unless it serves Meade County; and (2) the question of whether Rig Rivers will be permitted to serve Meade County when its existing contract with LG&E expires in 1969 must be determined by a subsequent application.

[4] As we view it, the question of whether the consumer market in the immediately foreseeable future will be sufficiently large to make it economically feasible for a proposed system or facility to be constructed (this is mentioned in East Kentucky as a significant factor for consideration) is not one which must be answered with absolute certainty; it is sufficient that there is a reasonable basis of anticipation. In our opinion, Meade County's being available as a market for Big Rivers' power could, under the circumstances of this case, be anticipated with sufficient reasonableness to warrant authorization for construction of a plant by Big Rivers designed to accommodate the needs of Meade County. And we think that in view of the long range planning necessary in the public utility field, an anticipation in 1966 of the needs of 1969 is not too remote. Furthermore, it would appear that even if Big Rivers were not granted authority to serve Meade County, the resulting temporary excess capacity of the Big Rivers generating plant could be utilized by the existing utilities (whose needs will constantly be growing), just as KU now utilizes the excess capacity of the OMU plant. It may be pointed out that the anticipation by OMU, in planning its 1964 plant, of serving Green River and Henderson-Union was not fulfilled but nevertheless there is an adequate market for the power from the 1964 plant.

[5] Several arguments are made by the appellants with respect to the overall feasibility of the Big Rivers proposal. One is that the system would not be sufficiently dependable because initially it will have only one interconnection with a source of emergency or stand-by power, and peaking power. In our opinion the evidence as to the possibilities of the Big Rivers plant and the interconnection source having simultaneous outages or failures was not such as to indicate any serious danger of a complete failure of service, and therefore the Public Service Commission was justified in finding that there was a reasonable assurance that Big Rivers will have an adequate supply of reserve power.

[6] Another argument addressed to feasibility is that Big Rivers cannot supply power at a cost as low as that of the existing utilities. The evidence for Big Rivers

would warrant a finding that the cost of Big Rivers power will be substantially lower than present costs. At the most, the evidence for the existing utilities shows only that they might supply power for a few cents less per KWH than could Big Rivers. The rates of Big Rivers would be reasonable on the basis of any appropriate standard. In our opinion, as concerns feasibility, no more is required.

[7] It is argued by OMU that Big Rivers' entire case, as concerns feasibility, rested upon a Power Load Study about which a Mr. Brown testified, and that his testimony was incompetent because the study was not prepared by him or by persons working under his supervision. We think the contention is without merit because: (1) Mr. Brown testified that he was responsible for making the original estimates upon which the Power Load Study was prepared; that the estimates subsequently were checked by field men (not working directly under him) and they verified all of his estimates except in one minor respect; (2) the Public Service Commission is not bound by strict rules of evidence; (3) there is no showing that there is any probability of error in the study or that an opportunity to cross-examine the field men would have been of any significant value; and (4) the circumstances of the preparation of the study were such as to warrant its being accorded reasonable reliability. Furthermore, it appears that the Power Load Study was addressed primarily to showing the existence of a sufficient consumer market, and there really is no serious contention in this case that the consumer market will not be sufficient to make the Big Rivers plan feasible.

[8] The appellants argue that the construction of the Big Rivers plant will result in wasteful duplication which, as defined in East Kentucky, embraces an excess of capacity over need, an excessive investment in relation to productivity or efficiency, or an unnecessary multiplicity of physical properties.

[9] There is really no basis for any argument that there will be an excess of capacity over need. As concerns transmission lines there is evidence that the main transmission lines of the existing utilities will have use to their full capacity without serving the distribution cooperatives, and that if Big Rivers were not permitted to operate the distribution cooperatives would be required to construct a large number of miles of tap-on lines. As concerns generating facilities, there is an admitted inadequacy of existing facilities. KU argues that its new 165,000 KW plant, proposed to be constructed in 1967, will be needed regardless of whether the Big Rivers plant is built, but at the same time KU says its new plant will provide enough capacity to serve the cooperatives and KU's other loads. We have a little trouble following that argument. It appears to us that if the new KU plant will be needed regardless of the cooperatives' needs, its ability to serve the cooperatives in addition to KU's other loads could be only of a short duration. That this is true is indicated by evidence that KU could avoid having an excess of capacity simply by postponing the construction of its new plant for one year.

[10] With respect to an excessive investment in relation to productivity or efficiency, the main argument is that the existing utilities can expand their facilities, to meet the continuing needs of the cooperatives, at a cost considerably lower than the cost of the Big Rivers system. As concerns generating facilities the argument is not valid because the proof does not show that the existing utilities can build generating plants more cheaply than can Big Rivers. It may be that the cost of the portion of KU's proposed 1967 generating plant that could be devoted to supplying the needs of the cooperatives would be less than the cost of Big Rivers' entire plant, but as hereinbefore pointed out, this would relate only to a temporary saving and would have little significance in the long range picture. It may be also that large

plants can produce power at a lower unit cost than small plants, but unless the difference in cost assumes major proportions (which is not shown here) there cannot be said to be a wasteful inefficiency in the small plant. As concerns transmission facilities it is argued that KU could expand its transmission lines sufficiently to meet the needs of the cooperatives at a cost of some $1,800,000, whereas Big Rivers proposes to spend some $5,500,000 for transmission lines. These cost comparisons are not entirely valid, because the Big Rivers costs embrace facilities that would not be provided by the KU plans, and some of the costs, such as those for the interconnection line with SEPA, might more properly be classed as generating costs rather than transmission costs. In any event, as pointed out in East Kentucky, cost is only one factor to be considered. Other questions are (1) will the lines parallel each other (if not, there is no duplication); (2) would it be feasible to distribute Big Rivers power over KU lines; and (3) would such service be adequate? The record is not such as to require affirmative answers to the latter questions. For example, there is evidence that the proposed KU lines would not provide for delivery of power directly to the load centers of the cooperatives, and in a number of instances would not meet high voltage needs. Actually, no one seriously suggests in this case that it would be feasible to distribute Big Rivers power over KU lines. The evidence warrants the conclusion that the overall investment in the Big Rivers system, as a unit, will not be excessive in relation to productivity or efficiency, so the possible fact that one part of the system, if taken alone, would involve an excessive investment is not important if, as is the case here, that part is not feasibily separable. It is our conclusion that the Public Service Commission was warranted in finding that there will be no duplication from the standpoint of excessive investment.

There is no real contention that there will be a duplication from the standpoint of a multiplicity of physical properties.

[11] It is contended by KU that economic waste will result from the construction and operation of the Big Rivers plant because the expansion of publicly owned power facilities (1) places the privately owned utilities in a less favorable position in the money market, increasing their financing costs, and (2) hinders the growth of unified, single power systems. However, there is no suggestion that this will result in any serious rate disadvantage to the consumers of the existing utilities. In substance the argument is that competition is bad in the public power field and that the public interest is best served through a large regulated monopoly. While it may be conceded that a large monopoly is in theory capable of rendering cheaper and more efficient service, there are other considerations that enter into the question of whether the monopoly system best serves the public interest. There has been no declaration of public policy of this state that the type of ownership that will provide the lowest rates is the only type of ownership that will be permitted to operate a utility service. See Public Service Commission v. Cities of Southgate, etc., Ky., 268 S.W.2d 19. Whether, in the overall public interest, competition has advantages that offset those of monopoly is a question our legislature has chosen to leave to the decision of the Public Service Commission.

[12] It is argued by OMU that the consumers in Owensboro will be subjected to an additional cost of $260,000 as a result of construction and operation of the Big Rivers plant, and that this shows that the Big Rivers project will cause economic waste. It appears that the claimed additional cost will grow out of fixed charges incurred or to be incurred by OMU in anticipation of the construction of a new generating unit which OMU had planned for 1968, but which might be delayed until

1971 by reason of the Big Rivers project. OMU says that in order to prevent a temporary excess of capacity it will be required to delay for perhaps three years the construction of its new unit in anticipation of which it already has incurred fixed charges for land, water supply, railroad facilities, etc. Assuming that OMU had made definite plans to construct the new unit in 1968 (the record indicates that the plans were far from definite and that the ultimate decision to build would be made by KU), it would appear that the solution to OMU's problem would be to delay for three years the construction of the Big Rivers plant. However, the evidence indicates that this would deprive the cooperatives of substantial savings in costs. Also, it seems that the claimed cost to the Owensboro consumers is attributable to the terms of OMU's contract with KU, and that if the Owensboro consumers lose, the KU consumers gain. When we consider all of the consumers involved we are not convinced that there will be any significant net economic loss from the immediate construction of the Big Rivers plant.

OMU maintains that an addition to its generating plant, completed in 1964, has enough capacity to serve the needs of Owensboro and of Green River for perhaps 10 years in the future. However, KU has contracted to buy, and it will have a market for, all power from the OMU plant in excess of the needs of Owensboro, so there will be no unused capacity in the plant even if the cooperatives do not use OMU power.

[13] KU contends that the Public Service Commission did not make adequate findings of fact and did not apply proper standards. We have examined carefully the Commission's order and in our opinion it embodies all essential findings of fact and applies proper standards.

[14–16] By way of conclusion it may be said that the basic issue in this case is whether, in a situation of inadequacy of existing facilities to supply immediately foreseeable needs, the existing utilities should be allowed to supply the inadequacy to the exclusion of a newcomer. As we view it, if the newcomer's proposal is feasible (capable of supplying adequate service at reasonable rates) and will not result in wasteful duplication, the Public Service Commission is authorized to grant a certificate to the newcomer. The Commission is not restricted to making a close comparison of whose rates will be lowest and whose service will be most efficient. Cf. Public Service Commission v. Cities of Southgate, etc., Ky., 268 S.W.2d 19. The existing utilities have no absolute right to supply the inadequacy. East Kentucky. Nor do they have any right to be free of competition. Tennessee Electric Power Company v. Tennessee Valley Authority, 306 U.S. 118, 59 S.Ct. 366, 83 L.Ed. 543.

Upon the whole record we cannot find that the determination of public convenience and necessity in this case, by the Public Service Commission, is unlawful, unreasonable or without adequate factual support.

The judgment is affirmed.