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

April 8, 2013

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APR 10 2013

PUBLIC SERVICE
COMMISSION

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

Re: Roy G. Cooksey, M.D. v. Warren County Water District
Case No. 2013-00109

Gentlemen:

Enclosed are an original and nine copies of Roy G. Cooksey, M.D.'s
"*Response to Motion to Dismiss*" to be filed in the above-referenced proceeding.

Thank you for your assistance.

Very truly yours,

ENGLISH, LUCAS, PRIEST & OWSLEY, LLP

A handwritten signature in cursive script that reads "Keith M. Carwell".

Keith M. Carwell

jhs

Enclosures

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

COMMONWEALTH OF KENTUCKY
PUBLIC SERVICE COMMISSION
CASE NO. 2013-00109

RECEIVED

APR 10 2013

PUBLIC SERVICE
COMMISSION

IN THE MATTER OF:

ROY G. COOKSEY, M.D.

PETITIONER

v.

RESPONSE TO MOTION TO DISMISS

WARREN COUNTY WATER DISTRICT

DEFENDANT

The Petitioner, Roy G. Cooksey, M.D. (“Dr. Cooksey), through counsel, states as follows in response to the Motion to Dismiss served March 29, 2013 by the Defendant, Warren County Water District (the “District”).

INTRODUCTION

The District is simply wrong when it states that the instant case involves the same issues decided in a prior case, *In the Matter of Roy G. Cooksey, Complainant v. Bowling Green Municipal Utilities and Warren County Water District, Defendants*, Case No. 2009-00190. In fact, as is demonstrated below, in the prior case the Commission specifically refused to address the issue that is presented in the instant case.

FACTUAL BACKGROUND

Dr. Cooksey, a retired surgeon, owns a farm consisting of approximately 100 acres lying to the north of Lover’s Lane in Warren County, Kentucky. Dr. Cooksey bought his farm in one tract on January 2, 1976 – it has never been divided since Dr. Cooksey bought it.

None of Dr. Cooksey’s farm is located within the limits of the City of Bowling Green, Kentucky (the “City”). The City lies to the north of Dr. Cooksey’s farm.

Dr. Cooksey's farm has always been provided with water and sewer services by the District or its predecessors.

Pursuant to service agreements entered into between the District and Bowling Green Municipal Utilities ("BGMU") in 2006 and 2007, for some unexplainable reason Dr. Cooksey's farm was split between the two utilities for purposes of providing water and sewer service. Under the service agreements, the front 30 acres of Dr. Cooksey's farm fronting on Lover's Lane is to be served, as it always has been, by the District. The rear 70 acres of the farm, containing a barn, which is landlocked and has no road frontage whatsoever, is to be served by BGMU. While the District already serves the Cooksey farm, the nearest point of service provided by BGMU is 1700 feet away. BGMU has never provided water or sewer service to any portion of Dr. Cooksey's farm.

As the result of the service agreements of 2006 and 2007 which inexplicably divided Dr. Cooksey's farm, Dr. Cooksey finds himself, through no fault or action of his own, on the horns of a dilemma. On the one hand, BGMU takes the position that, although its facilities are 1700 feet away from the farm, it has the sole right to provide water and sewer service to the rear 70 acres. BGMU has advised Dr. Cooksey that he may not even run a plastic garden hose from the front 30 acres of his farm to the barn located on the rear 70 acres. BGMU further informs Dr. Cooksey that in order to obtain water and sewer service from BGMU, he will be required to pay \$300,000 to construct the necessary lines and an additional \$320,000 assessment for connection to BGMU's facilities. On the other hand, the District, which already provides water and sewer service to Dr. Cooksey's farm, refuses to provide service to the rear 70 acres, citing the 2006 and 2007 service agreements with BGMU.

ARGUMENT

Publicly owned utilities are supposed to serve the public, including Dr. Cooksey. One would think that two such entities could exercise some modicum of common sense and simply amend the service agreement so that all of Dr. Cooksey's farm, which never should have been divided in the first place, would be served by the District. Instead, Dr. Cooksey is told that he must spend \$620,000 to have a water faucet near his barn so as to be able to water his livestock and to perhaps install a rest room in the barn.

With this background in mind, it is necessary to examine the proceedings in the prior case, Case No. 2009-00190, and to compare what occurred in the prior case with the instant case to demonstrate that the issue presented in the instant case is different from the issue decided in the prior case.

Case No. 2009-00190 was brought against both the District and BGMU. The *ad damnum* clause of the complaint in Case No. 2009-00190 requested the following relief:

WHEREFORE, Roy G. Cooksey, M.D., moves as follows:

1. That the Public Service Commission commence a proceeding to declare that WCWD to be the sole provider of water and sewer service to Dr. Cooksey's farm and to require WCWD and BGMU to adjust their service area boundaries accordingly,

2. That the Public Service Commission make BGMU and WCWD parties to this proceeding and require their prompt responses to the Complaint and Petition herein.

3. For all other relief to which Dr. Cooksey may appear entitled. (Emphasis added).

The Commission, in a decision entered April 16, 2010, a copy of which is attached as Exhibit A to the District's Memorandum in support of its Motion to Dismiss, dismissed the prior

case, Case No. 2009-00190, on the basis that the Commission did not have legal authority to prescribe a municipal utility's service area, stating at p. 9:

Based upon the foregoing, the Commission finds that it lacks the statutory authority to provide Complainant's requested relief and that this case should be dismissed as to both Defendants.²⁷ Having no statutory authority to preclude BGMU from serving the area in dispute or to direct a revision to BGMU's service area, we clearly also lack the authority to declare Warren District the sole provider of water and sewer service to Complainant's farm.

The present Verified Petition seeks the relief suggested in footnote 27 to the decision in the previous case, an issue that was not addressed in the previous case as acknowledged therein.

Footnote 27 to the April 16, 2010 decision states:

While Complainant's farm lies in BGMU's service area, it also lies within Warren District's territory. As a water district, Warren District 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.") 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. (Underlined emphasis added).

The present Verified Petition is filed only against the District, unlike the Verified Petition filed in the previous case. The *ad damnum* clause of the Verified Petition presently before the Commission seeks relief that is different from the relief sought in Case No. 2009-00190, stating:

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 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.

It is apparent from a comparison of the *ad damnum* clause of the previous Verified Petition to the *ad damnum* clause of the present Verified Petition that the relief sought in the instant case is entirely different from the relief sought in the previous case and that the issues in the present case are entirely different from the issues presented in the previous case. In fact, the Commission specifically stated in the decision in Case No. 2009-00190 that it was not addressing the issue raised by the present Verified Petition.

CONCLUSION

There is no merit to the District's motion to dismiss. The issues presented in the instant case are entirely different from the issues presented in Case No. 2009-00190. Footnote 27 of the April 16, 2010 decision by the Commission in Case No. 2009-00190 specifically noted that the issue raised in the present Verified Petition was not being decided therein.

WHEREFORE, the Petitioner, Roy G. Cooksey, M.D., requests that the Motion to Dismiss filed by the Warren County Water District be denied.

Respectfully submitted,

ENGLISH, LUCAS, PRIEST & OWSLEY, LLP
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Attorneys for Petitioner, Roy G. Cooksey, M.D.

BY: 

KEITH M. CARWELL

CERTIFICATE OF SERVICE

This is to certify that the original and nine copies of the foregoing **RESPONSE TO MOTION TO DISMISS** was mailed to:

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

and a copy was mailed to:

Mr. Frank Hampton Moore, Jr.
Mr. Matthew P. Cook
COLE & MOORE P.S.C.
921 College Street – Phoenix Place
P. O. Box 10240
Bowling Green, KY 42102-7240
Attorneys for Defendant,
Warren County Water District

This 8 April 2013.



KEITH M. CARWELL