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Kentucky Public Service Commission
211 Sower Boulevard
P.O. Box 615
Frankfort, Kentucky 40601

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

To Whom It May Concern:

Enclosed are the original and ten copies of Warren County Water District's reply brief in support of motion to dismiss in the above-referenced matter. Please file the enclosed documents of record in accordance with your standard procedure. If you should have any questions, please do not hesitate to contact me personally. Thank you for your assistance in this regard.

Very truly yours,

COLE & MOORE, P.S.C.



Matthew P. Cook

MPC/jrw

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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IN THE MATTER OF:

ROY G. COOKSEY, M.D.,

COMPLAINANT

V.

CASE NO. 2013-00109

WARREN COUNTY WATER DISTRICT,

DEFENDANT

**REPLY BRIEF IN SUPPORT OF WARREN COUNTY DISTRICT'S
MOTION TO DISMISS**

Defendant, Warren County Water District ("WCWD"), by counsel, for its reply brief in further support of its motion to dismiss, states as follows:

INTRODUCTION

The Complainant, Roy G. Cooksey, M.D., has filed a Verified Petition against WCWD seeking an order from the Commission to extend water and sewer service to that portion of his farm not currently served by it and additionally, for an order from the Commission to direct and require WCWD to file a petition with the Warren County Judge/Executive to amend the territorial limits of WCWD pursuant to KRS 74.110 to include all of Complainant's farm. WCWD has previously filed a motion to dismiss the Complainant's Verified Petition, stating that the Commission's ruling in a prior case filed by the Complainant, Commission Case No. 2009-00190, precludes the relief requested by the Complainant in this matter.

The Complainant has now filed his response to WCWD's motion to dismiss. Therein, Dr. Cooksey erroneously asserts that the relief he seeks in the instant matter is different from that requested and ruled on and dismissed by the Commission in the prior 2009 case. For the reasons set forth herein, it is submitted that the Complainant's position is mistaken and that the unchallenged 2009 decision of the Commission is binding and mandates a dismissal of the current complaint.

ARGUMENT

On May 14, 2009, Dr. Cooksey filed a complaint with the Commission in which he requested that WCWD be declared the exclusive provider of water and sewer service to his farm and that Bowling Green Municipal Utilities's right to provide water or sewer service to that farm be terminated. (Commission Case No. 2009-00190). On April 16, 2010, the Commission entered an order dismissing Dr. Cooksey's complaint in full. A copy of this order is attached hereto as Exhibit A. At pages 6-7 of the order, the Commission held as follows: "As BGMU is not within the statutory definition of 'utility,' the Commission lacks any authority over its rates or service. As we have no authority over its service, we cannot direct it to modify its service area boundary to exclude the area in which a portion of Complainant's farm is located." In addition, the Commission went on to hold as follows:

Present case law, moreover, does not support Complainant's assertion of Commission authority to alter or revise municipal utility boundaries. In *City of Georgetown v. Public Service Commission*, 516 [sic] S.W.2d 842 (Ky. 1974), Kentucky's highest court expressly held that this Commission lacked the statutory authority to resolve territory disputes involving municipal utilities and enjoined commission proceedings in which a public utility sought a cease and desist order to prevent a municipal utility from extending its facilities into the public utility's service area.

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. 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.

(April 16, 2010 Commission Order in Case No. 2009-00190 at p. 9) (emphasis added).

In addition, in the April 16, 2010 order in the 2009 case, the Commission also indicated, at page 3 of the order, that: "The farm is located within Warren District's territorial boundaries." (Emphasis added). The footnote to this statement, footnote 11, states as follows: "'Territorial boundaries' refers to the water district's political boundaries. These boundaries were established when Warren County Fiscal Court established Warren District's predecessors. KRS 74.110 sets forth the procedure by which these boundaries may be amended. Territorial boundary is not synonymous with 'service area.'"

As indicated in the memorandum in support of the motion to dismiss, Dr. Cooksey did not file a petition for rehearing following the entry of the Commission's dismissal order in the 2009 case. In addition, Dr. Cooksey did not appeal the Commission's dismissal order pursuant to KRS 278.410. Accordingly, the dismissal order became final and binding as to the parties involved in the case.

Dr. Cooksey has now filed the present Verified Petition against WCWD (Commission Case No. 2013-00109). As he points out in his response to the present motion to dismiss, Dr. Cooksey's complaint expressly seeks the following relief:

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.

(Dr. Cooksey's Verified Petition in Commission Case No. 2013-00109, pp. 7-8) (emphasis added).

In his response to the motion to dismiss, Dr. Cooksey erroneously contends that the relief he seeks in the present action is different from that which was requested and ultimately denied by dismissal in the 2009 case. The dismissal order in the 2009 case expressly states as follows: "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 the Complainant's farm." (April 16, 2010 dismissal order in Case No. 2009-00190, p. 9).

The first item in Dr. Cooksey's prayer for relief in the instant case states that he seeks a determination that his entire farm is within WCWD's service area. This is exactly what the Commission stated that it lacked the authority to declare in the 2009 case.

In addition, the second item in Dr. Cooksey's prayer for relief in the current case states that he seeks an order requiring WCWD to file a petition with the Warren County/Judge Executive pursuant to KRS 74.110 to amend its territorial limits to include all of the Cooksey farm. However, at page 3 of the dismissal order in the 2009 case, the Commission expressly noted that Dr. Cooksey's farm is located within WCWD's territorial boundaries. Footnote 11 of this order, also on page 3, expressly notes that the term "Territorial Boundaries" is not

synonymous with “service area.” So, to the extent that Dr. Cooksey seeks to require WCWD to petition for an amendment of its territorial boundary to include his farm, that request is moot since the Commission has already recognized that the farm is already located within WCWD’s territorial boundary. Further, to the extent that he seeks an amendment to WCWD’s service area to include his farm, as indicated above, the Commission has already ruled in the 2009 case that it lacks the authority to declare WCWD the sole provider of water and sewer service to the Cooksey farm (and further, that it lacks statutory authority to preclude BGMU from serving the area in dispute or to direct a revision to BGMU’s service area). Thus, the Commission considered both of the specific prayers for relief in the instant complaint in the prior 2009 case and the complaint was dismissed; not challenged by a petition for rehearing or appeal; and is now final and binding on the parties herein.

Finally, to the extent that Dr. Cooksey maintains that footnote 27 of the dismissal order in the 2009 case allows him to proceed with the current complaint, he misreads the Commission’s order. Specifically, at footnote 27 of the April 16, 2010 dismissal in the 2009 case, the Commission noted as follows: “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.” The Complainant is incorrect when he asserts that this statement allows him to proceed in this matter despite the dismissal of the 2009 complaint. The statement in footnote 27 of the dismissal order indicated that the Commission was reserving a ruling on the scope of its authority in a future separate case involving different parties given the statutory enactment in KRS 278.280. Had the

Commission felt that it needed to construe that issue to these parties in the 2009 case it certainly would have done so prior to entering the dismissal order.

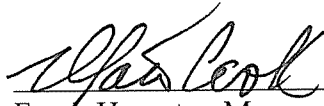
The Commission found that it either could not or did not need to rule on that issue to determine the cases before it. The fact remains that the Commission correctly held that it lacks authority to declare WCWD the sole provider of water and sewer service to Dr. Cooksey's farm and that it has no authority to preclude BGMU from serving that farm or to direct a revision to its service area. Those facts and those holdings remain unchanged and binding as to these parties. BGMU is an indispensable party to any adjudication of the service area issue between these parties. Since the Commission cannot exercise jurisdiction over BGMU on this issue, the instant case cannot proceed and dismissal is mandated.

CONCLUSION

The Commission has previously ruled that it lacks the legal authority to provide the Complainant with his requested relief. None of the facts have changed since the Commission previously ruled in 2009. The Commission lacks the legal authority to redraw the service area boundaries of the utilities involved and it cannot require BGMU to abandon its contractual right to service the subject property. As it maintained in the 2009 case, WCWD would not object to providing service to the Cooksey farm but it cannot do so at this time given the prior holding of the Commission and the agreement it reached with BGMU. Based on all of the foregoing, WCWD moves the Commission to dismiss the complaint with prejudice based upon the binding 2009 adjudication referenced herein. The entry of a consistent order is respectfully prayed.

This 10th day of April, 2013.

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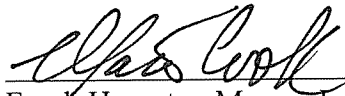


Frank Hampton Moore, Jr.
Matthew P. Cook
Counsel for WCWD

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has this 16th day of April, 2013, been placed in the U.S. Mail, postage prepaid, addressed to the following:

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Matthew P. Cook
Counsel for WCWD

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ROY G. COOKSEY)	
)	
COMPLAINANT)	
)	
v.)	
)	CASE NO. 2009-00190
BOWLING GREEN MUNICIPAL UTILITIES BOARD)	
and)	
WARREN COUNTY WATER DISTRICT)	
)	
DEFENDANTS)	
)	

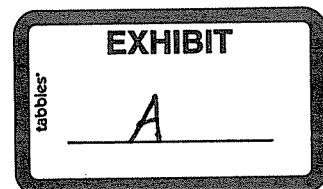
ORDER

Complainant has filed a formal complaint against Bowling Green Municipal Utilities Board ("BGMU") and Warren County Water District ("Warren District") in which he seeks an Order from the Commission requiring the Defendants to adjust their service area boundaries. Asserting that the Commission lacks jurisdiction to order the requested relief against it, BGMU has moved for dismissal. Finding that the Commission lacks the legal authority to prescribe a municipal utility's service area, we grant the motion and dismiss the complaint.

* * * * *

BGMU is a five-member board that was created pursuant to KRS Chapter 96¹ and that owns and operates the electric, water and sewer systems of the city of Bowling

¹ KRS 96.350-.510; KRS 96.550-.900.



Green, Kentucky.² It provides water service to 17,322 customers and sewer service to approximately 18,171 customers.³

Warren District, a water district organized pursuant to KRS Chapter 74, owns and operates facilities in Warren County, Kentucky that provide water service to 24,012 customers⁴ and sewer service to 3,994 customers.⁵ In existence since 1964, it serves mostly the non-incorporated areas of Warren County.⁶ It does not own or operate any water or sewage treatment facilities, but purchases its total water requirements from BGMU and transports all collected sewage to BGMU for treatment.

Complainant owns a 101-acre farm in Warren County, Kentucky, which he acquired in 1975.⁷ This farm is located on the west side of Lovers Lane and is completely outside the corporate limits of the city of Bowling Green. Warren District or its predecessor has provided water service to the farm since before Complainant's

² Bowling Green, Ky., Code of Ordinances §23-2.02 (2009). For a history of Bowling Green's water and sewer operations, see http://www.bgmw.com/water2_history.htm (last visited April 5, 2010).

³ See http://www.bgmw.com/about2_stats.htm (last visited April 5, 2010).

⁴ *Annual Report of Warren County Water District to the Public Service Commission of the Commonwealth of Kentucky for the Calendar Year Ended December 31, 2008 (Water Operations)* at 27.

⁵ *Annual Report of Warren County Water District to the Public Service Commission of the Commonwealth of Kentucky for the Calendar Year Ended December 31, 2008 (Sewer Operations)* at 12.

⁶ *2008 Water Annual Report* at 4. Warren District is the result of merger of three water districts: Northside Water District, Westside Water District and Morgantown Road Water District. See Case No. 5909, *The Proposed Merger of Northside Water District, Warren County, Kentucky, and Westside Water District* (Ky. PSC Dec. 18, 1973); Case No. 7186, *The Proposed Merger of the Warren County Water District, Warren County, Kentucky, and Morgantown Road Water District, Warren County, Kentucky* (PSC Ky. Jan. 16, 1979).

⁷ Complaint at ¶ 1.

acquisition of the property.⁸ Warren District currently serves the farm through a 10-inch water main.⁹ It has made sewer service available to the property through an 8-inch sewer main that runs along Lovers Lane.¹⁰ The farm is located within Warren District's territorial boundaries.¹¹

On August 3, 2006, the "Joint Engineering, Planning, and Finance Committee" – a committee consisting of two members of BGMU's Board and two members of Warren District's Board of Commissioners whose stated purpose is "to oversee the development and implementation of a long range plan for development and expansion of water and sewer service from BGMU" to Warren District¹² - recommended that the two utilities establish a sewer service boundary that would define the limits of their service. The proposed boundary effectively divides Complainant's farm. Approximately 70 acres of the farm fall within BGMU's proposed service area. The remaining 31 acres

⁸ In his Complaint, Dr. Cooksey alleges that Northside Water District previously provided water service to the property. Complaint at ¶ 1. In its answer, Warren District states that its predecessor, Westside Water District, actually served the property. Warren District Answer at 1.

⁹ Dr. Cooksey alleges that water service is provided through a 3/4-inch main and an 8-inch water main. Complaint at ¶ 1. Warren District states that a 10-inch water main serves the property. Warren District Answer at 1-2.

¹⁰ Dr. Cooksey alleges that a 12-inch sewer main is located on Lovers Lane. Complaint at ¶ 2. Warren District states the sewer service is presently available to the farm through an 8-inch sewer main. Warren District Answer at 2.

¹¹ "Territorial boundaries" refers to the water district's political boundaries. These boundaries were established when Warren County Fiscal Court established Warren District's predecessors. KRS 74.110 sets forth the procedure by which these boundaries may be amended. Territorial boundary is not synonymous with "service area."

¹² See Case No. 95-044, *The Application of Bowling Green Municipal Utilities for an Increase in Water and Sewer Rates to Warren County Water District* (Ky. PSC Feb. 27, 1996), App. A at 3. The creation of the Joint Committee was a term of an agreement between the two entities to resolve the issues presented by BGMU's application for an adjustment in its rates for wholesale water and sewer service.

fall within Warren District's area. Shortly after the issuance of the Joint Committee's recommendation, the governing bodies of both utilities adopted the recommended boundaries as the jurisdictional limits of their sewer service.¹³

On June 19, 2007, the Joint Committee recommended the establishment of similar boundaries for the two entities' water operations. These boundaries also divided Dr. Cooksey's farm between the two utilities. The governing bodies of both utilities subsequently adopted the recommended boundaries as the jurisdictional limits of their water service.¹⁴

On May 14, 2009, Complainant filed a complaint with the Commission in which he requests that Warren District be declared the exclusive provider of water and sewer service to his farm and that BGMU's rights to provide water or sewer service to the farm be terminated.

In his complaint, Complainant alleges that the boundary revisions are unlawful on three grounds. First, he asserts that the revised boundary subjects him to unreasonable prejudice or disadvantage with respect to water and sewer service. He contends that the utilities' actions were unjustly discriminatory as his farm is the only property that is transected by the service boundary and that lies wholly outside Bowling Green's corporate boundaries.¹⁵ Second, he alleges that the service boundary produces unnecessary and expensive duplication of facilities as it will require the construction of a

¹³ Resolution of the Board of Directors of the Bowling Green Municipal Utilities (Aug. 14, 2006); Reciprocal Resolution of the Board of Commissioners of the Warren County Water District (Aug. 29, 2006).

¹⁴ Resolution of the Board of Directors of the Bowling Green Municipal Utilities (July 9, 2007); Reciprocal Resolution of the Board of Commissioners of the Warren County Water District (June 26, 2007).

¹⁵ Complaint at ¶ 4.

1,700-foot sewer main from BGMU's existing sewer mains across adjacent properties to serve his farm when Warren District's sewer facilities are already available.¹⁶ Third, he alleges that the boundary revision is contrary to KRS 96.150.¹⁷

Upon service of the Complaint, BGMU moved to dismiss the Complaint for lack of subject matter jurisdiction. In its motion, it asserts that the Commission lacks jurisdiction over the territory boundaries established by agreement between a municipal utility and a public utility. While acknowledging that the Commission possesses limited jurisdiction over rates and service standards contained in agreements between municipal utilities and public utilities, it contends that the agreement at issue involves neither.

In its response to BGMU's motion, Complainant alleges that the resolutions between BGMU and Warren District constitute agreements that affect both rates and service and are therefore subject to Commission regulation pursuant to KRS 278.200. BGMU has submitted a reply to this response.

Warren District has filed an Answer to the Complaint and a response to BGMU's motion. While taking no position on the motion, Warren District has asserted that, should the Commission grant the motion and dismiss BGMU as a party to this case, the Commission will not be able to grant the relief requested in the Complaint.

¹⁶ *Id.* at ¶ 6. Dr. Cooksey alleges that this sewer main extension will cost in excess of \$200,000. He further alleges that BGMU will assess him "allocated sewer development cost" fees in excess of \$320,000.

¹⁷ Complaint at ¶ 7.

* * * * *

BGMU's motion presents the following issue: Does the Commission have jurisdiction to direct revisions in a municipal utility's service area and to prohibit or otherwise limit the municipal utility's service to a geographical area?

The Commission is "a creature of statute and has only such powers as have been granted to it by the General Assembly."¹⁸ KRS 278.040(1) provides that the Commission has the authority to regulate public utilities and to enforce the provisions of KRS Chapter 278. This authority to regulate public utilities, however, extends only to rates and service.¹⁹

The statutory definition of "utility," however, expressly excludes any city that "owns, controls, operates, or manages any facility used or to be used for or in connection with" the treatment or distribution of water or the collection, transportation or treatment of sewage.²⁰ As a result of this exclusion, Kentucky courts have generally concluded that "all operations of a municipally owned utility whether within or without the territorial boundaries of the city" are exempt from Commission jurisdiction.²¹

As BGMU is not within the statutory definition of "utility," the Commission lacks any authority over its rates or service. As we have no authority over its service, we

¹⁸ *Boone County Water and Sewer District v. Public Service Commission*, 949 S.W.2d 588, 591 (Ky. 1997). See also *Croke v. Public Service Commission of Kentucky*, 573 S.W.2d 927, 929 (Ky. App. 1978) ("The Public Service Commission's powers are purely statutory; like other administrative boards and agencies, it has only such powers as are conferred expressly or by necessary or fair implication").

¹⁹ KRS 278.040(2).

²⁰ KRS 278.010(3)(d) and (f).

²¹ *McClellan v. Louisville Water Co.*, 351 S.W.2d 197, 199 (Ky. 1961). See also *City of Mount Vernon v. Banks*, 380 S.W.2d 268, 270 (Ky. 1964) ("In the operation of a water plant a municipal corporation is not under the jurisdiction of the Public Service Commission").

cannot direct it to modify its service area boundary to exclude the area in which a portion of Complainant's farm is located.

Complainant argues that the current case falls within a limited exception to the exemption granted to municipal utilities that the Kentucky Supreme Court recognized in *Simpson County Water District v. City of Franklin*, 872 S.W.2d 460 (Ky. 1994).²² This exception occurs when a municipal utility contracts to provide utility service to a public utility.²³ Complainant argues that the resolutions that BGMU and Warren District have adopted regarding service area boundaries constitute an agreement that affects both rates charged to him and the service that he receives. As a result of entering this agreement, he argues, BGMU has waived its exemption from Commission jurisdiction and is subject to Commission authority.²⁴

Assuming that the resolutions constitute an agreement between the two entities, we find little evidence to support the proposition that they establish a rate or service standard. The resolutions do not refer to rates. While the practical effect of the

²² 872 S.W.2d at 463 (“[W]here contracts have been executed between a utility and a city . . . KRS 278.200 is applicable and requires that by so contracting the City relinquishes the exemption and is rendered subject to PSC rates and service regulation”).

²³ KRS 278.200 provides:

The commission may, under the provisions of this chapter, originate, establish, change, promulgate and enforce any rate or service standard of any utility that has been or may be fixed by any contract, franchise or agreement between the utility and any city, and all rights, privileges and obligations arising out of any such contract, franchise or agreement, regulating any such rate or service standard, shall be subject to the jurisdiction and supervision of the commission, but no such rate or service standard shall be changed, nor any contract, franchise or agreement affecting it abrogated or changed, until a hearing has been had before the commission in the manner prescribed in this chapter.

²⁴ Complainant's Response to Motion to Dismiss at 3.

resolutions is to limit a resident within the defined service area to the rates charged by the designated service provider, the resolutions do not specify a rate for any type of service nor do they even refer to rates.

While the resolutions establish specific geographical areas in which each entity would provide service to the exclusion of the other, the establishment of such areas is not within the statutory definition of "service." KRS 278.010(13) defines "service" as

any practice or requirement in any way relating to the service of any utility, including the voltage of electricity, the heat units and pressure of gas, **the purity, pressure, and quantity of water**, and in general the quality, quantity, and pressure of any commodity or product used or to be used for or in connection with the business of any utility [emphasis added].

In adopting this definition, the General Assembly appears to have intended for "service" to include how the utility's product was provided and its general nature and quality, not its geographical availability.²⁵

Present case law, moreover, does not support Complainant's assertion of Commission authority to alter or revise municipal utility boundaries. In *City of Georgetown v. Public Service Commission*, 516, S.W2d 842 (Ky. 1974), Kentucky's highest court expressly held that this Commission lacked the statutory authority to resolve territory disputes involving municipal utilities and enjoined Commission

²⁵ See Case No. 96-256, *City of Lawrenceburg, Kentucky v. South Anderson Water District* (Ky. PSC June 11, 1998) at 5 - 6. In *Simpson County Water District v. City of Franklin*, 872 S.W.2d at 464, moreover, the majority expressly found that the "rates and service exception had no relationship to" the issue of service territorial disputes.

proceedings in which a public utility sought a cease and desist order to prevent a municipal utility from extending its facilities into the public utility's service area.²⁶

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.

IT IS THEREFORE ORDERED that:

1. BGMU's Motion to Dismiss is granted.
2. This case is dismissed and is removed from the Commission's docket.
3. Subject to the filing of timely petition for rehearing pursuant to KRS 278.400, these proceedings are closed. The Executive Director shall place any future filings in the appropriate utility's general correspondence file or shall docket the filing as a new proceeding.

²⁶ See also *City of Flemingsburg v. Public Service Commission*, 411 S.W.2d 920 (Ky. 1967); Case No. 2004-00027, *City of Hawesville v. East Daviess County Water Association* (Ky. PSC Mar. 25, 2004).

²⁷ 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.

By the Commission

ENTERED
APR 16 2010 *sl*
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:

Richard G. Hoff for
Executive Director

Case No. 2009-00190

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