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February 14, 2014

VIA FEDEX

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Kentucky Public Service Commission
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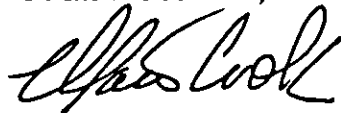
RE: *Roy G. Cooksey, M.D. v. Warren County Water District*
PSC Case No. 2013-00109

Dear Mr. Derouen:

Enclosed please find the original and ten copies of a Brief on behalf of Defendant, Warren County Water District, in the above-referenced matter. Please file these enclosures in this case. Thank you for your assistance in this regard. Please call us with any questions.

Very truly yours,

COLE & MOORE, P.S.C.



Frank Hampton Moore, Jr.
Matthew P. Cook

Enclosures

xc: John Dix. (w/ encl.)

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

IN THE MATTER OF
ROY G. COOKSEY, M.D.,
COMPLAINANT

FEB 17 2014

PUBLIC SERVICE
COMMISSION

V.

CASE NO. 2013-00109

WARREN COUNTY WATER DISTRICT,
DEFENDANT

BRIEF ON BEHALF OF DEFENDANT,
WARREN COUNTY WATER DISTRICT

Defendant, Warren County Water District ("WCWD"), by counsel, pursuant to the Commission's scheduling order of January 27, 2014, for its brief, 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 WCWD 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. In 2009, Dr. Cooksey filed a similar action with the Commission against both WCWD and Bowling Green Municipal Utilities Board ("BGMU") seeking the same relief. (See Kentucky Public Service Commission Case No. 2009-00190, styled *In the Matter of: Roy G. Cooksey*,

M.D., Complainant v. Bowling Green Municipal Utilities Board and Warren County Water District, Defendants).

In the 2009 case, the Commission entered an order granting the motion to dismiss filed by BGMU and further, dismissing the case and removing it from the Commission's docket. A copy of the Commission's order, entered on April 16, 2010, is attached hereto as Exhibit A. In making the ruling to dismiss the complaint, the Commission held as follows:

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.

(Commission's April 16, 2010 Order dismissing Complaint, p. 9) (emphasis added) (copy attached as Exhibit A).

Dr. Cooksey did not appeal the Commission's 2009 dismissal order. Therefore, it is final and binding on the parties in the present action. After the instant action was filed by Dr. Cooksey, WCWD filed a motion to dismiss, arguing that the 2009 order resolved the matters raised herein. The Commission denied the motion to dismiss on July 9, 2013 and ordered WCWD to file an answer to Dr. Cooksey's petition (a copy of the order is attached as Exhibit B). WCWD then filed its answer and stated that Dr. Cooksey was not entitled to any of the relief he requested in the petition.

The parties to the action have agreed that the dispute is legal in nature and that an evidentiary hearing is unnecessary. The parties agreed to submit an agreed stipulation of facts and then to file briefs on the issues presented in the petition. A copy of the agreed stipulation of facts is attached hereto as Exhibit C.

For the reasons set forth herein, WCWD submits that Dr. Cooksey is not entitled to the relief he requested in his petition for the following reasons: (1) the Commission's final order in the 2009 case referenced above – specifically, the conclusion that the Commission has no statutory authority to preclude BGMU from serving the area in dispute or to direct a revision to BGMU's service area and that it lacks the authority to declare WCWD the sole provider of water and sewer service to Complainant's farm – precludes a ruling for Dr. Cooksey; (2) BGMU is an indispensable party to this proceeding and absent its joinder in the case – which is precluded by the Commission's final order in the 2009 case – the matter cannot be adjudicated by the Commission; and (3) Dr. Cooksey has not and cannot meet his burden to establish his entitlement to any of the requested relief.

FACTUAL BACKGROUND

As indicated above, the parties have agreed to the following stipulation of facts:

1. The real property, water and sewer service to which is the issue before this Commission, ("Cooksey Farm"), was acquired by Complainant, Dr. Roy G. Cooksey, by deed dated 2 January 1976, of record in Deed Book 444, Page 19, in the office of the Warren County Clerk and has been continuously owned by him since that date.
2. The Cooksey Farm was acquired by one boundary pursuant to the deed set forth in Paragraph 1 above, not in tracts, and has not been subdivided in any manner.
3. At the time of acquisition of the Cooksey Farm and for many years prior to that date, Warren County Water District ("WCWD"), and its predecessor, Westside Water District, provided water service to the Cooksey Farm. As of this date, the only water service to the Cooksey Farm has been provided by WCWD which has both a 10 inch water main and 1 inch

water service line on the Cooksey Farm. No other utility presently has or has ever provided water or sewer service to the Cooksey Farm.

4. Sewer service is presently available from WCWD to the entire Cooksey Farm. No other utility has sewer or water service presently available on the Cooksey Farm or has ever provided sewer or water service to the Cooksey Farm.

5. In 1975, the current territorial boundaries of WCWD were established by the Warren Fiscal Court. At that time, only the territorial boundary line bisected the farm. As a result of that action, 30 acres adjacent to Lovers Lane ("Front Acreage") are within the current WCWD territorial limits, and the remaining 70 acres ("Rear Acreage") of the Cooksey Farm are outside the current WCWD territorial limits.

6. The entire Cooksey Farm lies outside the city limits of Bowling Green, Kentucky, and the Farm's Rear Acreage is not currently within WCWD's territorial limits.

7. While WCWD does have a sewer line located on the Front Acreage, no other utility has sewer service presently available to the Cooksey Farm, with Bowling Green Municipal Utilities' closest sewer line being over 1,700 feet from the Cooksey Farm with no current easements which would provide it the right to install a sewer line to the Rear Acreage.

In addition to the agreed facts referenced above, WCWD offers the following information. The boundary line for water service between WCWD and BGMU was established by agreement in the mid-1970's. Subsequently, 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 WCWD'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 WCWD – recommended that the two utilities establish a

sewer service boundary that would better define the limits of their service. See Commission 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 February 27, 1996). The creation of the Joint Committee was a term of an agreement between the two utilities to resolve the issues presented by BGMU's application for an adjustment in its rates for wholesale water and sewer service.

Approximately 70 acres of the Cooksey farm fall within BGMU's service area and the remaining 30 acres fall within WCWD's service 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. Thereafter, on June 19, 2007, the Joint Committee recommended the establishment of similar boundaries for the two utilities' water operations. The governing bodies of both utilities subsequently adopted the recommended boundaries as the jurisdictional limits of their water service. (See Exhibit D attached, the resolutions of BGMU and WCWD establishing the agreed water and sewer service boundaries). Both the sewer and water service boundaries established in 2006 and 2007, respectively, are identical to the WCWD territorial boundary established in 1975 across the subject property and prior to Dr. Cooksey's purchase in 1976.

Dr. Cooksey complains that the service boundary lines established by agreement between BGMU and WCWD harm him because he does not receive water and sewer service from the single entity of his choice. Specifically, Dr. Cooksey alleges that the water and sewer service from BGMU would be more costly for him, and he asserts that he is entitled to receive service for his entire property from WCWD. WCWD contends that its service boundary agreement with BGMU is valid and binding. WCWD does not per se object to providing water and sewer

service to the entire Cooksey farm but it believes its agreements with BGMU are legal and enforceable. Thus, it cannot agree to the relief requested by Dr. Cooksey.

In reality, the boundary line for water service was established in the 1970's. That water boundary line is 1,000 feet off Lovers Lane. The front portion of the Cooksey farm therefore was supplied with water by WCWD. The back 70 acres of the farm has always been considered part of BGMU's water service area. It is contiguous with BGMU's existing water service area. In fact, at the Lovers Lane Soccer Complex, and in particular at the maintenance building at the rear of the property (see Exhibit A of Cooksey's 2009 complaint), BGMU has installed an 8 inch water line, directly adjacent to Dr. Cooksey's property. Thus, water service is readily available from BGMU at the back 70 acre portion of the Cooksey farm. No resolutions in either 2006 or 2007 "changed" the water service area for the Cooksey farm. The 2007 resolution was adopted merely to clean up the water service boundary map in other areas. Dr. Cooksey's farm was not affected.

The Lovers Lane area in which the Cooksey farm is located had been previously unserved for sewer by any utility. Thus, Dr. Cooksey, as of that time, was not a customer of either BGMU or WCWD for sewer service. BGMU and WCWD established a sewer boundary line by resolutions in 2006, and set that sewer service boundary line along the same line as the water service boundary line at Dr. Cooksey's farm. The sewer service boundary line was set between and among BGMU and WCWD after extensive engineering studies which took into consideration capacities of BGMU's sewer system and topography in the area (BGMU treats all sewage received from WCWD). It was determined that the back 70 acres of the Cooksey farm should remain a part of BGMU's service area.

Therefore, the resolutions adopted in 2006 did not have the effect of changing the back 70 acres of the Cooksey property from being a WCWD customer to a BGMU customer. For the back 70 acres, Cooksey had never been a WCWD sewer customer. The back 70 acres had never been part of WCWD's sewer service area.

Additionally, Dr. Cooksey makes no credible argument that he is unable to receive an acceptable quantity of water overall. As stated, BGMU has an 8 inch water line available to serve the back 70 acres of the Cooksey farm. The fact that an individual customer does not get to choose which of the two possible entities to provide his water service is not an issue of quantity of the water provided so as to constitute a service issue; it is simply an issue of which utility provides the water. Dr. Cooksey requests the Commission to issue a directive regarding the boundary between the service area of a municipal service provider and that of a public entity, an issue which the commission has held that it "lacks any legal authority" to do. See In the Matter of City of Hawesville v. East Daviess County Water Association, Inc., 2004 WL 2039467 (Ky. P.S.C. 2004) (copy attached as Exhibit E); see also Exhibit A attached, Commission Order in 2009 Cooksey case at page 9).

ARGUMENT

THE COMMISSION'S FINAL ORDER IN THE 2009 CASE IS DISPOSITIVE.¹

In the 2009 case filed by Dr. Cooksey, he requested that WCWD 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. (See Commission Case No. 2009-00190). After the 2009 complaint was filed, BGMU filed a motion to dismiss, contending that as a municipal utility, it was exempt from the jurisdiction of the Commission. WCWD took no position on BGMU's motion but it did state that if the motion to dismiss was granted, then no relief could be granted under the complaint because BGMU was an indispensable party to the action and the issues presented.

On April 16, 2010, the Commission entered an order dismissing Dr. Cookey's 2009 complaint in full. A copy of this order is attached as Exhibit A. At pages 6-7 of the order, the Commission held: "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 in its order 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.

¹ WCWD asks the Commission to reconsider its prior ruling on its motion to dismiss on this issue and reserves the right to raise this (and all other) issues on appeal if necessary.

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.

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.

(Commission's Dismissal Order in Case No. 2009-00190, pp. 8-9) (emphasis added) (attached as Exhibit A).

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, seeking an order from the Commission requiring WCWD to extend sewer service to that portion of his farm not currently served by it and further, seeking an order from the Commission to direct and require the Warren County Water District to file a petition with the Warren County Judge/Executive to amend its territorial limits pursuant to KRS 74.110 to include all of his farm (and impliedly, to remove BGMU as a provider). For the reasons set forth herein, it is submitted that the Commission has already adjudicated these issues and that the present petition must be dismissed.

The Complainant herein seeks the exact same relief that he sought in the 2009 case which was dismissed by the Commission. To the extent that Dr. Cooksey disagreed with the 2009 decision of the Commission, he had two options—(1) to file a petition for rehearing of the Commission order pursuant to KRS 278.400 within twenty days of the dismissal order; or (2) to file an appeal of the Commission’s dismissal order to the Franklin Circuit Court pursuant to KRS 278.410 within thirty days after the entry of the dismissal order or within twenty days after the denial of a petition for rehearing. Dr. Cooksey did not do either of these things; he did not file a petition for rehearing with the Commission nor did he initiate an appeal of the dismissal order.

An order of the Commission continues in full force until modified or revoked by the Commission or until it is vacated in whole or in part by a court of competent jurisdiction. Commonwealth ex rel. Stephens v. South Central Bell Telephone Co., 545 S.W.2d 927, 931 (Ky. 1976). The right to challenge an order of the Commission (or any other state agency) is a matter of legislative grace and the technical requirements to exercise those rights must be strictly construed. The failure to fully comply with the statutory requirements, including the time in which to ask for rehearing or to file an appeal, are mandatory. Taylor v. Duke, 896 S.W.2d 618, 621 (Ky. App. 1995). Thus, the Complainant’s failure to either petition for rehearing or to appeal the 2009 dismissal order in accordance with the statutory instructions is fatal to the instant action seeking the same relief.

The Commission has previously ruled that it lacks the legal authority to provide the Complainant with his requested relief. Specifically, the Commission held that it cannot preclude BGMU from serving the area in dispute or to direct a revision to BGMU’s service area. The Commission also correctly held that it lacks the authority to declare WCWD the sole provider of water and sewer service to Dr. Cooksey’s farm. 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 cannot require BGMU to abandon its contractual right to service the subject property. As such, Dr. Cooksey is not entitled to any relief.

**BGMU IS AN INDISPENSABLE PARTY TO THIS CASE AND
RELIEF CANNOT BE GRANTED IF IT IS NOT BEFORE THE COMMISSION.**

WCWD has pleaded throughout the 2009 case and again in the present action, that BGMU is an indispensable party and that no relief requested in the complaint can be granted without BGMU before the Commission as a party. Dr. Cooksey seeks to set aside the resolutions of the governing bodies of BGMU and WCWD concerning their respective service boundary areas. The agreements between the two utilities are contractual in nature. Thus, both parties must be before the Commission if it attempts to adjudicate the validity of the service area boundary agreements.

Since the commission has already ruled in the 2009 case that it has no jurisdiction over BGMU and that it lacks the statutory authority to preclude BGMU from servicing the area in dispute (and consequently lacking the authority to declare WCWD the sole provider of water and sewer service to the Cooksey farm) and because that order went unchallenged and is not final, there can be no adjudication by the Commission on the issues raised again by Dr. Cooksey in his 2013 complaint. Simply stated, the Commission cannot reach the merits on the validity of service area agreements without BGMU before it as a party. See Milligan v. Schenley Distillers, Inc., 584 S.W.2d 751, 753 (Ky. App. 1979) (“An indispensable party is one whose absence prevents the court from granting complete relief among those already parties.”); West v. Goldstein, 830 S.W.2d 379, 382 (Ky. 1992) (characterizing necessary party as “those persons whose interest would be divested by an adverse judgment”); RAM Engineering & Const., Inc. v.

University of Louisville, 127 S.W.3d 579, 582-583 (Ky. 2003) (holding that successful bidder on stadium construction project was an indispensable party to litigation commenced against university by original low bidder).

EVEN IF THE COMMISSION CONSIDERS THE ISSUES IN THE PRESENT COMPLAINT, DR. COOKSEY HAS FAILED TO MEET HIS BURDEN OF PROOF.

Footnote 27 of the Commission's dismissal order in the 2009 action states as follows: "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." It should be noted that the same Attorney General Opinion referenced above (OAG 75-719) also states:

The right to such relief [service sought by a consumer] is not absolute, "and the relief may be denied where the demand is wholly unreasonable, in view of the peculiar hardships and disastrous consequences that would follow." Mountain Water Co. v. May, 192 Ky. 13, 231 S.W. 908 (1921); and Moore v. City Council of Harrodsburg, Ky., 105 S.W. 926 (1907). Thus, in the absence of fraud, corruption, or arbitrary action, the judgment of the Board of Commissioners of the water district as to the general management of the affairs of the district is beyond judicial control.

...
Thus it is our opinion that the commissioners of the district exercise a discretionary function in deciding whether or not to extend its system to an entirely new section within its certified

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

(Emphasis added).

WCWD's service area cannot be "reasonably extended" in this case. There is a service area agreement with BGMU which is binding. To deviate from that service area agreement would create the possibility of a legal action by BGMU against WCWD (and likely against the Commission) in a court of competent jurisdiction to enforce the agreement. Such a legal action would unnecessarily and unreasonably require WCWD to expend public funds to defend itself in such a legal action. Since the Commission has no jurisdiction over BGMU (as it ruled in the 2009 case), such an action would have to be filed in a court proceeding where BGMU has standing to proceed. Further, such a legal action would also require the Commission to be named as a party since its ruling would be implicated and challenged. All of this is unnecessary and unreasonable to WCWD and its customers who would ultimately be responsible for the costs associated with the defense of such a case.

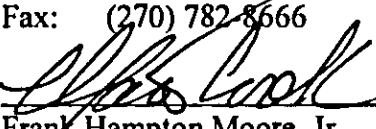
Dr. Cooksey does have current access to service through BGMU. Whether he chooses to use that access is up to him. WCWD believes its agreements with BGMU as to service areas are binding and enforceable. Unless there is a legal ruling that these agreements are not binding (where BGMU is a party and able to advocate its position to the decision-maker), then WCWD has no choice but to defend the agreements and maintain that the current service areas are enforceable. As the Commission noted at footnote 11 of its 2009 order (attached as Exhibit A), the territorial boundaries of a water district are not synonymous with its service area. The request by Dr. Cooksey to have WCWD's territorial boundaries changed would not affect its

service area. Thus, both requests for relief (to declare WCWD his sole water and sewer service provider and to change WCWD's territorial boundaries) must be denied. WCWD has not abused its discretion as to the service boundary issue and accordingly, Dr. Cooksey's complaint and request for relief fails.

CONCLUSION

Based on all of the foregoing, WCWD urges the Commission to deny each of the Complainant's requests for relief. The entry of a consistent order is respectfully prayed.

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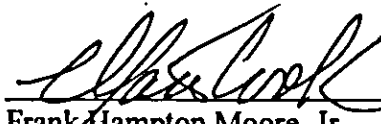


Frank Hampton Moore, Jr.
Matthew P. Cook
Counsel for Warren County Water District

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has this 14th day of February, 2014, forwarded by U.S. Mail to the following:

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Bowling Green, KY 42102-0770
Counsel for Roy G. Cooksey, M.D.



Frank Hampton Moore, Jr.
Matthew P. Cook
Counsel for Warren County Water District

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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of: :

ROY G. COOKSEY

COMPLAINANT

v.

BOWLING GREEN MUNICIPAL UTILITIES BOARD

and

WARREN COUNTY WATER DISTRICT

DEFENDANTS

CASE NO. 2009-00190

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.bgm.com/water2_history.htm (last visited April 5, 2010).

³ See http://www.bgm.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
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:


Executive Director

Case No. 2009-00190

Honorable Keith M Carwell
Attorney At Law
English, Lucas, Priest & Owsley
1101 College Street
P.o. Box 770
Bowling Green, KY 42102

Honorable Timothy L Edelen
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Warren County Water District
523 US Highway 31W Bypass
P. O. Box 10180
Bowling Green, KY 42102-4780

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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

ORDER

Complainant has filed a formal complaint against Warren County Water District ("Warren District") in which it seeks an Order directing Warren District to petition the Warren County Judge/Executive to extend Warren District's territory to include Complainant's farm in its entirety and directing Warren District to extend water and sewer service to the portion of his farm that Warren District does not presently serve. Contending that the Commission's decision in Case No. 2009-00190¹ precludes the current complaint, Warren District moves to dismiss. We deny the motion and direct Warren District to answer the Complaint.

Warren District, a water district organized pursuant to KRS Chapter 74, owns and operates facilities in Warren County, Kentucky providing water service to 25,924

¹ Case No. 2009-00190, *Roy G. Cooksey v. Bowling Green Municipal Utilities Board and Warren County Water District* (Ky. PSC Apr. 16, 2010).

customers² and sewer service to 4,970 customers.³ In existence since 1964, it serves mostly the non-incorporated areas of Warren County.⁴ It does not own or operate any water or sewage treatment facilities, but purchases its total water requirements from Bowling Green Municipal Utilities Board ("BGMU")⁵ and transports all collected sewage to BGMU for treatment.⁶

Complainant owns a 101-acre farm in Warren County, Kentucky, which he acquired in 1976.⁷ The farm is located outside the corporate limits of Bowling Green, Kentucky. Warren District or its predecessor has provided water service to the farm since before Complainant's acquisition of the property. Warren District also provides sewer service to the farm.

In 2006, the governing bodies of BGMU and Warren District adopted service areas for their water services.⁸ The following year, the governing bodies of BGMU and

² *Annual Report of Warren County Water District to the Public Service Commission for the Calendar Year Ended December 31, 2012 (Water Operations) ("2012 Water Annual Report")* at 27.

³ *Annual Report of Warren County Water District to the Public Service Commission for the Calendar Year Ended December 31, 2012 (Sewer Operations) ("2012 Sewer Annual Report")* at 12.

⁴ *2012 Water Annual Report* at 4. Warren District is the product of the mergers 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* (Ky. PSC Jan. 16, 1979).

⁵ *2012 Water Annual Report* at 30.

⁶ *2012 Sewer Annual Report* at 11.

⁷ Complaint at 2 (filed Mar. 15, 2013).

⁸ 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). This resolution did not amend or alter Warren District's existing territorial boundaries. Only the Warren County Judge Executive, after a public hearing, may make such revisions. See KRS 74.110.

Warren District adopted similar service areas for their sewer services.⁹ These limits for water and sewer services divide the Complainant's farm. Approximately 70 acres of Complainant's farm are within BGMU's service area and the remaining 31 acres of the farm are within Warren District's service area.¹⁰

On May 18, 2009, Complainant filed a complaint against BGMU and Warren District in which he requested the Commission order BGMU and Warren District to adjust their agreed service areas and declare Warren District the *exclusive* provider of water and sewer service to his farm. He also requested termination of BGMU's rights to provide water or sewer service to the farm.¹¹ We docketed his complaint as Case No. 2009-00190.

Upon BGMU's motion, we dismissed the complaint. We found no statutory authority to permit us to preclude BGMU from serving Complainant's farm or to direct a revision to BGMU's service area and dismissed the complaint and expressly stated that we lacked the authority to declare Warren District the *sole* provider of water and sewer service to the Complainant's farm.¹²

In his present complaint, which he filed on March 15, 2013, Complainant requests an order from the Commission for Warren District to extend water and sewer service under KRS 278.280 to his entire farm despite Warren District's voluntary

⁹ 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). This resolution did not amend or alter Warren District's existing territorial boundaries.

¹⁰ Case No. 2009-00190, Complaint at ¶¶ 1 and 3 (filed May 18, 2009); Order of Apr. 16, 2010 at 3.

¹¹ Case No. 2009-00190, Complaint at 5.

¹² *Id.*, Order of Apr. 16, 2010 at 9.

agreement with BGMU.¹³ Complainant states that approximately 30 acres of his farm are within Warren District's territorial boundaries and the remainder lies outside the city of Bowling Green's corporate limits and Warren District's territory.¹⁴ He states that, pursuant to KRS 278.280(3), the Commission may direct Warren District to make reasonable extensions of service and may further direct Warren District to seek an expansion of its existing boundaries to make a reasonable extension of service.¹⁵

Moving to dismiss the current complaint, Warren District argues that the Commission found in Case No. 2009-00190 that the Commission lacked the authority to declare Complainant's entire farm within Warren District's service area and that this decision precludes the current complaint. On this point, Warren District is mistaken. In Case No. 2009-00190, the Commission held only that the Commission lacked jurisdiction to direct revisions to a municipal utility's service area or to prohibit or otherwise limit a municipal utility's service to a geographical area.¹⁶ Lacking such jurisdiction, we found no authority to declare Warren District the *sole* provider of water or sewer service to Complainant's farm.¹⁷

While lacking the authority to consider the previous complaint, the Commission foresaw the possibility that the Complainant or others might seek relief that is within our

¹³ Case No. 2013-00109, Complaint at 7-8.

¹⁴ *Id.* at 3. Given that Complainant states in his Complaint that his farm is 101 acres and that 70 acres of the farm are located in the BGMU designated area and the remainder in Warren District's territory, it would appear that 31 acres, not 30, are located in Warren District's territory.

¹⁵ *Id.* at 4-6.

¹⁶ Case No. 2009-00190, Order of April 16, 2010 at 9.

¹⁷ *Id.*

statutory authority. For this reason, we expressly limited the scope of our ruling and identified a potential issue that was not being addressed. In a footnote, we stated:

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.¹⁸

This issue is the very issue that the Complaint now presents to us.

Warren District asserts that the Commission's statement regarding the application of KRS 278.280 "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."¹⁹ As the Complainant in that proceeding was represented by legal counsel, as his complaint contained a detailed request for specific relief, and as the requested relief was not within the Commission's authority to grant, the Commission was neither obligated nor did public policy require to us to go beyond the issue specifically presented to us.

Warren District also argues that, as the Commission in our Order of April 16, 2010, found that Complainant's entire farm was located within Warren District's territory, Complainant's request that Warren District be required to seek an amendment to its

¹⁸ *Id.* at 9, fn. 27.

¹⁹ Warren District's Reply Brief in Support of Motion to Dismiss at 5-6 (filed Apr. 12, 2013).

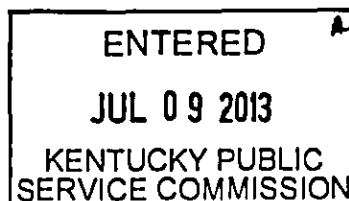
territory boundary is moot. It notes that, as the Complainant did not seek judicial review of the Commission's Order, he is bound by that finding.²⁰

Based upon our review of the record in Case No. 2009-00190, we find that our earlier finding should not preclude taking evidence on whether Complainant's farm is located within Warren District's boundaries. The earlier finding was not essential to the Commission's holding in the Order of April 16, 2010. Neither the location of the Complainant's farm nor Warren District's boundaries had any effect on that holding. Moreover, we can find no basis in the record to support the finding. In the absence of such evidence, the Commission will not preclude either party from introducing evidence on Warren District's existing territorial boundaries.

IT IS THEREFORE ORDERED that:

1. Warren District's Motion to Dismiss is denied.
2. Warren District shall file an answer within 14 days of entry of this Order.

By the Commission



ATTEST:



Executive Director

²⁰ *Id.* at 5. See Case No. 2009-00109, Order of April 16, 2010 at 3, fn. 11.



COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF

ROY G. COOKSEY, M.D.,
COMPLAINANT

VS.

CASE NO. 2013-00109

WARREN COUNTY WATER DISTRICT,
DEFENDANT

STIPULATION OF FACTS

The parties hereto, by and through their counsel, hereby advise the Commission that they have stipulated the following facts:

1. The real property, water and sewer service to which is the issue before this Commission, ("Cooksey Farm") was acquired by Complainant, Dr. Roy G. Cooksey, by deed dated 2 January 1976, of record in Deed Book 444, Page 19, in the office of the Warren County Clerk and has been continuously owned by him since that date.

2. The Cooksey Farm was acquired by one boundary pursuant to the deed set forth in Paragraph 1 above, not in tracts, and has not been subdivided in any manner.

3. At the time of acquisition of the Cooksey Farm and for many years prior to that date, Warren County Water District, the Defendant ("WCWD"), and its predecessor, Westside Water District, provided water service to the Cooksey Farm. As of this date, the only water

service to the Cooksey Farm has been provided by WCWD which has both a 10 inch water main and 1 inch water service line on the Cooksey Farm. No other utility presently has or has ever provided water or sewer service to the Cooksey Farm.

4. Sewer service is presently available from WCWD to the entire Cooksey Farm. No other utility has sewer or water service presently available on the Cooksey Farm or has ever provided sewer or water service to the Cooksey Farm.

5. In 1975, the current territorial boundaries of WCWD were established by the Warren Fiscal Court. At that time, only the territorial boundary line bisected the farm. As a result of that action, 30 acres adjacent to Lovers Lane ("Front Acreage") are within the current WCWD territorial limits, and the remaining 70 acres ("Rear Acreage") of the Cooksey Farm are outside the current WCWD territorial limits.

6. The entire Cooksey Farm lies outside the city limits of Bowling Green, Kentucky, and the Farm's Rear Acreage is not currently within WCWD's territorial limits.

7. While WCWD does have a sewer line located on the Front Acreage, no other utility has sewer service presently available to the Cooksey Farm, with Bowling Green Municipal Utilities' closest sewer line being over 1,700 feet from the Cooksey Farm with no current easements which would provide it the right to install a sewer line to the Rear Acreage.

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Roy G. Cooksey, M.D.

BY: 

KEITH M. CARWELL

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Phone: (270) 782-6666
E-Mail: hmoore@coleandmoore.com
Attorneys for Defendant,
Warren County Water District

BY: 

FRANK HAMPTON MOORE, JR.

This is to certify that the original and ten copies of the foregoing
STIPULATION OF FACTS, was mailed to:

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

and a copy was mailed to:

Frank Hampton Moore, Jr.
COLE & MOORE, P.S.C.
P. O. Box 10240
Bowling Green, KY 42102-7240
Attorney for Warren County Water District

This ^{20th} day of January, 2014.



KEITH M. CARWELL



**RECIPROCAL RESOLUTION OF THE BOARD OF COMMISSIONERS
OF THE WARREN COUNTY WATER DISTRICT**

WHEREAS, an agreed order issued by the Commonwealth of Kentucky before the Public Service Commission set forth in Case No. 95-044 directed that Bowling Green Municipal Utilities ("BGMU") and Warren County Water District ("WCWD") jointly create a "Joint Engineering, Planning, and Finance Committee" ("COMMITTEE") to oversee and develop the implementation of long range plans for the development and expansion of water and sewer service by BGMU and WCWD, to include the necessary capital improvements needed for such service, and:

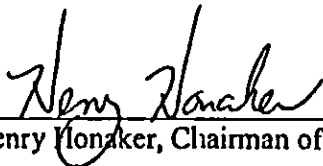
WHEREAS, all future capital improvements of BGMU and WCWD that result from the need for increased service and all future capital improvements which have an impact on the service of BGMU and WCWD is to be reviewed by the Committee in an effort to provide the customers of both utilities with the best service for the least costs, and:

WHEREAS, the Committee has met and has recommended to the Board of Commissioners the approval of a sewer service boundary as described in the attached resolution and map dated the 3rd day of AUGUST, 2006.

NOW, THEREFORE, be it resolved by WCWD that the resolution of the joint committee be approved by WCWD and the sewer service boundary contained therein

adopted by WCWD as the jurisdictional limits of sewer service effective as of the date of this resolution.

ADOPTED this 29th day of AUGUST, 2006.


Henry Honaker, Chairman of the Board

ATTEST:


Glen Ray Johnson, Secretary of the Board

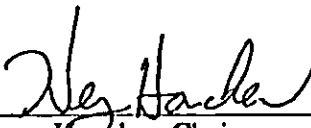
**RECIPROCAL RESOLUTION OF THE BOARD OF COMMISSIONERS
OF THE WARREN COUNTY WATER DISTRICT**

WIHEREAS, an agreed order issued by the Commonwealth of Kentucky before the Public Service Commission set forth in Case No. 95-044 directed that Bowling Green Municipal Utilities ("BGMU") and Warren County Water District ("WCWD") jointly create a "Joint Engineering, Planning, and Finance Committee" ("COMMITTEE") to oversee and develop the implementation of long range plans for the development and expansion of water and sewer service by BGMU and WCWD, to include the necessary capital improvements needed for such service, and:

WHEREAS, the Committee has met and has recommended to the Board of Commissioners the approval of a water service boundary as described in the attached resolution and map dated the 19th day of June, 2007.

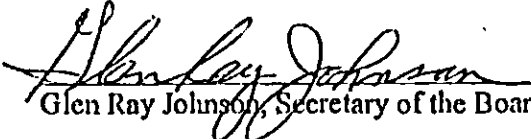
NOW, THEREFORE, be it resolved by WCWD that the resolution of the joint committee be approved by WCWD and the water service boundary contained therein adopted by WCWD as the jurisdictional limits of water service effective as of the date of this resolution.

ADOPTED this 26th day of June, 2007.



Henry Honaker, Chairman of the Board

ATTEST:


Glen Ray Johnson, Secretary of the Board

RESOLUTION OF THE JOINT ENGINEERING,
PLANNING, AND FINANCE COMMITTEE OF THE
WARREN COUNTY WATER DISTRICT AND THE
BOWLING GREEN MUNICIPAL UTILITIES

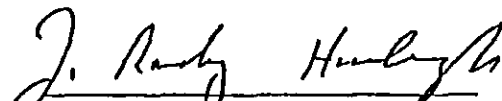
At a meeting of the Joint Engineering, Planning, and Finance Committee ("Joint Committee") which occurred on the 19th day of JUNE, 2007, the following resolution was unanimously adopted:

RESOLVED, that it is the recommendation of the Joint Engineering, Planning, and Finance Committee of the Warren County Water District ("WCWD") and Bowling Green Municipal Utilities ("BGMU") that the respective Boards of BGMU and WCWD approve and adopt the water service boundary as shown on the attached map (BGMU/WCWD Agreed Water Service Area Boundary Map dated June 19, 2007) as the jurisdictional limits for water service by the respective utilities, effective on the date of this resolution.

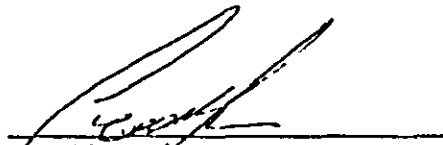
DATED this 19th day of JUNE, 2007.

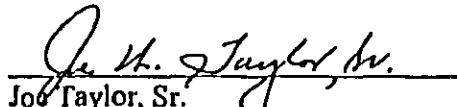
BOWLING GREEN
MUNICIPAL UTILITIES

WARREN COUNTY
WATER DISTRICT


Randy Hansbrough, M.D.


Henry Henaker


Alex Nottmeier


Joe Taylor, Sr.


**RESOLUTION OF THE BOARD OF DIRECTORS
OF THE BOWLING GREEN MUNICIPAL UTILITIES**

WHEREAS, an agreed order issued by the Commonwealth of Kentucky before the Public Service Commission set forth in Case No. 95-044 directed that Bowling Green Municipal Utilities ("BGMU") and Warren County Water District ("WCWD") jointly create a "Joint Engineering, Planning , and Finance Committee" ("COMMITTEE") to oversee and develop the implementation of long range plans for the development and expansion of water and sewer service by BGMU and WCWD, to include the necessary capital improvements needed for such service, and:

WHEREAS, the Committee has met and has recommended to the Board of Directors the approval of a water service boundary as described in the attached resolution and map dated the 19th day of June, 2007.

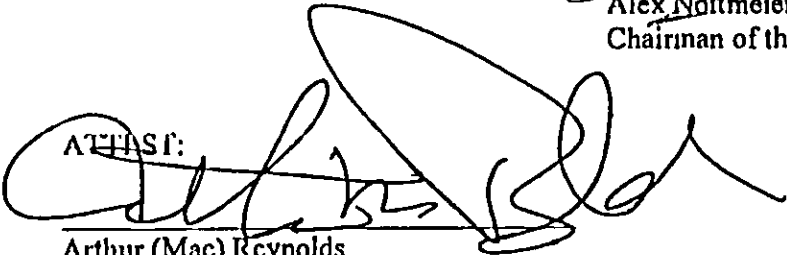
NOW, THEREFORE, be it resolved by BGMU that the resolution of the joint Committee be approved by BGMU and the water service boundary contained therein adopted by BGMU as the jurisdictional limits of water service effective as of the date of this resolution.

ADOPTED this 9th day of July, 2007.



Alex Noffmeier
Chairman of the Board

ATTEST:



Arthur (Mac) Reynolds
Secretary of the Board

RESOLUTION OF THE JOINT ENGINEERING,
PLANNING, AND FINANCE COMMITTEE OF THE
WARREN COUNTY WATER DISTRICT AND THE
BOWLING GREEN MUNICIPAL UTILITIES

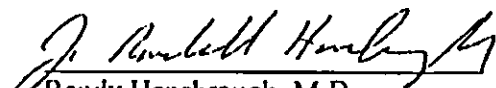
At a meeting of the Joint Engineering, Planning, and Finance Committee ("Joint Committee") which occurred on the 3RD day of AUGUST, 2006, the following resolution was unanimously adopted:

RESOLVED, that it is the recommendation of the Joint Engineering, Planning, and Finance Committee of the Warren County Water District ("WCWD") and Bowling Green Municipal Utilities ("BGMU") that the respective Boards of BGMU and WCWD approve and adopt the sewer service boundary as shown on the attached map (BGMU/WCWD Agreed Sewer Service Area Boundary Map dated August 3, 2006) as the jurisdictional limits for sewer service by the respective utilities, effective on the date of this resolution.

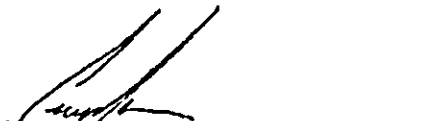
DATED this 3RD day of AUGUST, 2006.

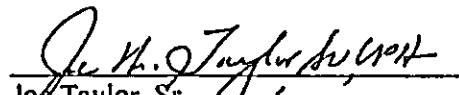
BOWLING GREEN
MUNICIPAL UTILITIES

WARREN COUNTY
WATER DISTRICT


Randy Hansbrough, M.D.


Henry Honaker


Alex Nottmeier


Joe Taylor, Sr.

**RESOLUTION OF THE BOARD OF DIRECTORS
OF THE BOWLING GREEN MUNICIPAL UTILITIES**

WHEREAS, an agreed order issued by the Commonwealth of Kentucky before the Public Service Commission set forth in Case No. 95-044 directed that Bowling Green Municipal Utilities ("BGMU") and Warren County Water District ("WCWD") jointly create a "Joint Engineering, Planning , and Finance Committee" ("COMMITTEE") to oversee and develop the implementation of long range plans for the development and expansion of water and sewer service by BGMU and WCWD, to include the necessary capital improvements needed for such service, and:

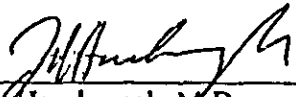
WHEREAS, all future capital improvements of BGMU and WCWD that result from the need for increased service and all future capital improvements which have an impact on the service of BGMU and WCWD is to be reviewed by the Committee in an effort to provide the customers of both utilities with the best service for the least costs, and:

WHEREAS, the Committee has met and has recommended to the Board of Directors the approval of a sewer service boundary as described in the attached resolution and map dated the 3rd day of August, 2006.

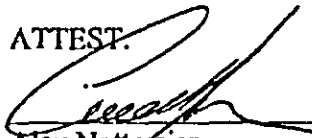
NOW, THEREFORE, be it resolved by BGMU that the resolution of the joint Committee be approved by BGMU and the sewer service boundary contained therein

adopted by BGMU as the jurisdictional limits of sewer service effective as of the date of this resolution.

ADOPTED this 14th day of August, 2006.



Randy Hansbrough, M.D.
Chairman of the Board

ATTEST.


Alex Notmeier
Secretary of the Board

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2004 WL 2039467 (Ky.P.S.C.)
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In the Matter of: CITY OF HAWESVILLE, KENTUCKY COMPLAINANT
v.
EAST DAVIESS COUNTY WATER ASSOCIATION, INC. DEFENDANT

Case No. 2004-00027

Kentucky Public Service Commission

Done at Frankfort, Kentucky, this 25th day of March, 2004.

ORDER

BY THE COMMISSION

The city of Hawesville, Kentucky ("Hawesville") has filed a formal complaint against East Daviess County Water Association, Inc. ("East Daviess") in which it alleges that East Daviess is improperly providing water service without its consent to a person whom Hawesville previously served. Our review of the complaint indicates that the sole issue presented is whether the Commission has jurisdiction to resolve a territorial dispute between a municipal utility and a public utility. Finding in the negative, we dismiss the complaint on our own motion.

Hawesville is a city of the fifth class located in Hancock County, Kentucky. It owns and operates a water treatment and distribution system that provides retail water service to approximately 930 customers within its corporate limits.¹ East Daviess is a water association organized pursuant to KRS Chapter 273. It owns and operates a water distribution system that provides retail water service to approximately 4,112 customers in Daviess, Hancock and Ohio counties.² It serves approximately 931 customers in Hancock County.³ East Daviess purchases its total water requirements from Owensboro Municipal Utilities.

On January 16, 2004, Hawesville filed with the Commission a formal complaint against East Daviess in which it alleges that East Daviess has extended its water mains and installed a water meter to provide water service to a Hawesville customer. Hawesville further alleges that East Daviess took these actions without Hawesville's consent and after advising Hawesville that it would not serve the customer in question.

In its answer, East Daviess admits providing water service to the customer, but denies constructing any facilities to serve him. It states that the customer installed a service line to an existing East Daviess water main, requested water service from the water association, and tendered the required meter installation fee. It asserts that under these circumstances, Commission regulations required it to provide water service.⁴

Our review of the pleadings leads us to question whether we have jurisdiction to resolve the matters alleged in the complaint.⁵ The Commission is "a creature of statute and has only such powers as have been granted to it by the General Assembly." Boone County Water and Sewer District v. Public Service Commission, Ky., 949 S.W.2d 588, 591 (Ky. 1997). See also Croke v. Public Service Commission of Kentucky, Ky.App., 573 S.W.2d 927, 929 (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") KRS 278.040(1) provides that the Commission has the authority to regulate public utilities⁶ and to enforce the provisions of KRS Chapter 278. This authority to regulate public utilities, however, extends only to rates and service. KRS 278.040(2).

The sole issue presented in Hawesville's complaint is its purported exclusive right to serve an existing customer. Hawesville implies, though does not expressly state, that only it may provide water service to its existing customers and that East Daviess

may not serve any of those customers without its consent. Hawesville presents no issue related to East Daviess's rates or service. Its requested relief is a Commission directive prohibiting East Daviess from extending water service into areas that Hawesville presently serves.

Nothing within KRS Chapter 278 authorizes this Commission to establish or enforce exclusive service territories for water utilities. See Kentucky Utilities Co. v. Pub. Serv. Com'n. Ky., 390 S.W.2d 168, 175 (1965) (stating that existing utilities do not "have any right to be free of competition."); Kentucky-American Water Co., Case No. 91-359 (Ky. P.S.C. Apr. 17, 1992); Mountain Utilities, Inc. v. Equitable Gas Co., Case No. 91-316 (Ky. P.S.C. Apr. 6, 1992). Cf. Re Flowing Wells, Inc., 180 PUR 4th 117 (Ind. URC 1997). Neither KRS Chapter 96, which governs the operation and governance of municipal utilities, nor KRS Chapter 273, which governs water associations, conveys such authority to the Commission.

The Commission lacks any legal authority to resolve territory disputes that arise between municipal water utilities and public water utilities. City of Georgetown, Kentucky v. Pub. Serv. Com'n. Ky., 516 S.W.2d 842, 845 (1974) ("While it may be desirable that the Public Service Commission resolve this type dispute because of its expertise in this area, this is of legislative, not judicial, concern, and we feel compelled to follow the clear language of KRS 278 010(3)."). See also City of Lawrenceburg, Ky. v. South Anderson Water District, Case No. 1996-00256 (Ky. P.S.C. Jun. 11, 1998).⁷

Based upon the discussion above, we conclude that the Commission lacks subject matter jurisdiction over Hawesville's complaint and finds that the complaint should be dismissed.

IT IS THEREFORE ORDERED that Hawesville's complaint is dismissed with prejudice.

Footnotes

- 1 Governor's Water Resource Development Commission, Water Resource Development: A Strategic Plan (1999), Appendix B - Green River Area Development District Water System Summaries at 14, at http://wris.ky.gov/wrdc_plan/gradd.pdf (last visited Mar. 17, 2004)
- 2 Annual Report of East Daviess County Water Association, Inc. to Public Service Commission for the Year Ended December 31, 2002 at 4 and 27.
- 3 Governor's Water Resource Development Commission, supra note 3, at 13.
- 4 See Answer at 2; 807 KAR 5.006, Section 5.
- 5 In raising this issue on our own motion, we are acting within our authority. See Am. Jur.2d Administrative Law § 277 (May 2003) ("An administrative agency generally may and must determine whether it has jurisdiction in a particular situation.").
- 6 Municipal water utilities are generally excluded from the statutory definition of utility. See KRS 278.010(1)(d) ("'Utility' means any person except . . . a city, who owns, controls, operates, or manages any facility used or to be used for or in connection with . . . [t]he diverting, developing, pumping, impounding, distributing, or furnishing of water to or for the public, for compensation . . ."). But see Simpson County Water District v. City of Franklin, Ky., 872 S.W.2d 460 (1994).
- 7 We note that the allegations in Hawesville's complaint, if liberally interpreted, might conceivably support the claim that East Daviess improperly provided water service without first obtaining a Certificate of Public Convenience and Necessity. In its complaint, Hawesville implies that East Daviess's provision of water service of the same nature and to the same location will result in the wasteful duplication of utility facilities. However, Hawesville neither expressly states nor implies that East Daviess's provision of service involves the construction of facilities that conflict with the service of other public utilities, involve sufficient capital outlay to materially affect East Daviess's existing financial condition, or will result in increased charges to East Daviess's customers. As such conditions are necessary to require a Certificate of Public Convenience and Necessity for construction that is otherwise considered in the ordinary course of business, East Daviess's lack of a certificate cannot serve as a basis to proceed with this case. See 807 KAR 5 001, Section 9(3).