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February 27, 2014

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

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

Gentlemen:

Enclosed are an original and ten copies of the ***Reply Brief on Behalf of Complainant, Roy G. Cooksey, M.D.,*** to be filed in the above-referenced proceeding.

Thank you for your assistance.

Very truly yours,

ENGLISH, LUCAS, PRIEST & OWSLEY, LLP

Keith M. Carwell

jhs
Enclosures
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COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED
FEB 28 2014
PUBLIC SERVICE COMMISSION

IN THE MATTER OF

ROY G. COOKSEY, M.D.,
COMPLAINANT

VS.

CASE NO. 2013-00109

WARREN COUNTY WATER DISTRICT,
DEFENDANT

REPLY BRIEF ON BEHALF OF COMPLAINANT, ROY G. COOKSEY, M.D.

The purpose of this Reply Brief on behalf of Complainant, Roy G. Cooksey, M.D. ("Cooksey"), is to respond to arguments raised in the Brief filed on behalf of Defendant, Warren County Water District ("WCWD").

1. THIS COMMISSION'S ORDER IN CASE NO. 2009-00190 IS NOT DISPOSITIVE.

The Defendant argues that this Commission's Order in Case No. 2009-00190 ("2009 Case") is dispositive of the issues presently before this Commission. Nothing could be further from the truth.

The Defendant's same argument was raised in Defendant's Motion to Dismiss this case, which was overruled. In the Order overruling the Motion to Dismiss, the Commission correctly held that it does have the authority to grant the relief requested in the

current complaint. The Commission went on to hold that the Defendant's argument that the ruling in the 2009 Case somehow precluded the Commission from acting in this case was not well taken. In fact, this Commission held:

> 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.

This Commission went further in explaining that its ruling in the 2009 Case was expressly limited in scope and actually identified a potential issue which was not addressed in the 2009 Case stating:

> 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.

That is precisely the issue which is presently before the Commission.

The Defendant argues that its voluntary agreement with Bowling Green Municipal Utilities ("BGMU") limits this Commission's authority under KRS 278.280 to require an extension of service but provides no statutory or regulatory basis for that position. In fact, it seems to argue that its agreement, which was neither submitted to nor approved by this Commission, has the effect of granting exclusive jurisdiction and exclusive right to serve with respect to that portion of the farm owned by Complainant which is the subject of this action ("Rear Acreage") to BGMU.

As set forth in Complainant's original Brief, the Kentucky Court of Appeals has properly held that utilities do not have exclusive rights to service territories. ***Carroll County***

Water District No. 1 v. Gallatin County Water District, (Ky. Court of Appeals, April 23, 2010). **(APPENDIX 1).** In that case, the Court determined that there was no wasteful duplication of service as there was currently no service being provided. That is precisely the issue presently before this Commission. As has been stipulated, there is no sewer service which can be provided by BGMU in the immediate vicinity of the Rear Acreage. The only sewer service in the immediate vicinity is the sewer line of WCWD which is actually installed on the farm ("Farm") of which the Rear Acreage forms a part. The extension of those lines would certainly not result in any wasteful duplication of service or facilities as there are no others. The determination that there is no exclusive right to serve for a water utility has further consistently been the position of this Commission. ***Auxier Water Company v. City of Prestonsburg,*** 96-362 (Kentucky PSC April 2, 1997); ***Kentucky Utilities Company v. Public Service Com'n***, Ky., 390 S.W.2d 168 (1965).

It is respectfully submitted that the Defendant's assertion that it is prohibited from extending its territory and service as a result of a voluntary agreement with BGMU improperly limits this Commission's authority under KRS 278.280 to require WCWD to make a reasonable extension of service and to direct WCWD to seek an expansion of existing boundaries in order to accomplish that. Clearly, that is within the authority of this Commission recognized both by statute and precedent.

2. **WCWD GOES OUTSIDE THE RECORD AND ARGUES FACTS WHICH ARE NOT IN EVIDENCE.**

As acknowledged in the Defendant's Brief, the parties to this action have agreed that the dispute before the Commission is legal in nature and that no evidentiary hearing was required. The parties, therefore, agreed to submit an agreed Stipulation of Facts and then to

file briefs on the issues presented in the Petition based upon those facts. Nowhere in the Stipulation of Facts is there any reference to an agreement between the Defendant and BGMU nor is there any reference that either water or sewer service to the Rear Acreage is available from BGMU.

Now, however, the Defendant submits additional "facts" related to its agreement with BGMU and the existence or availability of water service which could be provided by BGMU in the vicinity of the Rear Acreage. This is in direct contradiction to the Stipulations filed in this action. No facts have been presented as to BGMU's territorial limits. However, it was stipulated that the entire Farm, including the Rear Acreage, lies entirely outside the city limits of Bowling Green. It is uncontradicted and, in fact, has been stipulated that WCWD is the only utility to ever provide water service to the Farm, and "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." Now, for the first time, the Defendant argues that BGMU has water service available stating it as a fact, although it has not been stipulated to, and there is simply no evidence before this Commission that such water service is available. In fact, it was stipulated that it is not available. Interestingly, the Defendant does not even now assert that sewer service is available from BGMU.

It is respectfully submitted that this Commission should not consider matters which are outside the record concerning both the voluntary agreement entered into between WCWD or the availability of existing water service when, in fact, there is no evidence before this Commission that this exists. The Defendant now argues that the Rear Acreage has "always been considered part of BGMU's water service area" even though there is no evidence

that when the boundary line for the WCWD territorial limits was established in the 1970s that BGMU had any water service within miles of the Farm. Though no evidence has been presented, it is respectfully submitted that the Lover's Lane Soccer Complex and maintenance building referred to in the Brief of the Defendant was certainly not in existence in the 1970s or for many years thereafter.

CONCLUSION

As set forth in the original Brief of the Complainant, the core purpose of this Commission is to prevent unnecessary duplication of plans, facilities and services, and the adjustment of WCWD territorial limits and the requested extension, in the ordinary course of business, by WCWD of its water and sewer services and facilities would accomplish this purpose. Further, this Commission clearly has the authority pursuant to KRS 278.280 to grant the relief requested by Complainant.

Respectfully submitted,

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Roy G. Cooksey, M.D.

BY: _____
KEITH M. CARWELL

This is to certify that the original and ten copies of the foregoing **REPLY BRIEF ON BEHALF OF COMPLAINANT, ROY G. COOKSEY, M.D.,** 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 27 February 2014.

KEITH M. CARWELL

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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000864-MR

CARROLL COUNTY WATER
DISTRICT NO. 1. APPELLANT

v.

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

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

OPINION
AFFIRMING

** ** ** ** **

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

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

BACKGROUND INFORMATION

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

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

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

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

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

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

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

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

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

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

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

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

DISCUSSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ALL CONCUR.

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GALLATIN COUNTY WATER
DISTRICT:

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BRIEF FOR APPELLEE,
GALLATIN COUNTY
JUDGE/EXECUTIVE:

John G. Wright
Warsaw, Kentucky

NO BRIEF FILED FOR APPELLEE,
TOMMY CRAWFORD.

NO BRIEF FILED FOR APPELLEE,
JOHN ZALLA.

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

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