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February 27, 2014

VIA OVERNIGHT FEDEX

Jeff Derouen, Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, KY 40602-0615

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 Reply 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

IN THE MATTER OF

ROY G. COOKSEY, M.D.,

COMPLAINANT

V.

WARREN COUNTY WATER DISTRICT,

DEFENDANT

RECEIVED

FEB 28 2014

PUBLIC SERVICE COMMISSION

CASE NO. 2013-00109

REPLY 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 reply brief, states as follows:

WCWD adopts and incorporates by reference its previously stated arguments in this matter as if set forth in full herein.

The issue presented in this case is whether the voluntary agreements of WCWD and Bowling Green Municipal Utilities ("BGMU") regarding the allocation of service area limits are valid and enforceable. The beginning point for this analysis is KRS 74.070(1) which states: "The commission shall be a body corporate for all purposes, and may make contracts for the water district with municipalities and other persons." (Emphasis added). In addition, it has been held that a municipal utility has a right to serve an area within five miles of its limits even though the area is within a water district. See City of Cold Spring v. Campbell County Water District,

334 S.W.2d 269 (Ky. 1960). Given these authorities, there is a presumption that the contractual agreements at issue here are binding and enforceable.

Next, KRS 278.280(3) directs that the complainant's request for an extension of service be examined to determine its reasonableness. The Warren County Attorney, Amy Hale Milliken, issued an opinion on June 25, 2012 concerning the service agreements agreed to by WCWD and BGMU. A copy of this opinion letter is attached as Exhibit A. Therein, County Attorney Milliken stated: "there was no attempt to change the territorial boundary [by WCWD and BGMU] which was established by Warren Fiscal Court in 1975. These resolutions ... were to establish service areas for the two services (water and sewer). As I have said in the past, the term "territorial boundaries" and "service areas" are not synonymous ... It appears the Resolutions essentially allow BGMU and WCWD to agree upon service areas for the WCWD within the long established territorial boundaries of the WCWD ... It is my opinion Fiscal Court only has the authority to set territorial boundaries. I know of no legal authority or requirement for the fiscal court to take action concerning service areas." (Emphasis original). Thus, the Warren County Attorney (counsel for the Warren Fiscal Court) has opined that the agreements at issue are not problematic.

When it dismissed Dr. Cookey's 2009 case on these issues, the Commission 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." (See Exhibit B attached). In the prior dismissal order, the Commission referenced OAG 75-719 (a copy of which is attached hereto as Exhibit C). The Attorney General Opinion states, in pertinent part, as follows:

> 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) 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 likely 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 (as well as the taxpayers who fund the Commission) 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 agreements are enforceable. As the Commission noted at footnote 11 of its 2009 order (attached as Exhibit B), 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.

Dr. Cooksey presumes he can get service from WCWD for his entire farm cheaper than he can from BGMU. However, BGMU claims that there is limited capacity in its system on Cemetery Road and suggests that an engineering study is needed to determine if capacity improvements are required if the entire Cooksey farm is to be included in WCWD's service area. See Exhibit D attached, February 17, 2014 letter from BGMU's General Manager to WCWD's General Manager stating: "Because of the surcharging conditions identified in the analysis, BGMU has concluded that no additional service area in and along the wastewater drainage basins served by the Cemetery Road sewer interceptor can be accepted. Should additional service territory be requested to be served by the Cemetery Road sewer interceptor (including, but not limited to, the back portion of the Dr. Roy Cooksey farm), an engineering study would be required and capacity additions would be borne by the requesting utility."

WCWD does not concede that the capacity issue cited by BGMU is correct but it does raise an issue that calls into question Dr. Cooksey's claim that he can get cheaper service from WCWD than from BGMU. Either way, the issue is not as simple as Dr. Cooksey suggests.

The real issue here concerns future development of the Cooksey farm (prime real estate in Warren County). The developer (Cooksey) is customarily called on to make initial expenditures to enable utility infrastructure to be developed or extended. The developer then recoups this initial investment when the land is subdivided and sold to end users. There is nothing unreasonable in the current service area agreements between BGMU and WCWD. They were reached after much study and analysis. Dr. Cooksey cannot show that his request to deviate from the service agreements is reasonable because of the issues it would likely generate (the potential litigation referenced above and the resulting defense costs to both WCWD and the Commission as well as the potential costs for capacity improvements).

This case is about future land development. It is not unreasonable for a utility to expect the landowner/developer to initially contribute to utility infrastructure because the same developer will ultimately benefit from this action and make up the initial investment when the land is sold. Dr. Cooksey should not be allowed to circumvent the customary land development process and receive special treatment. His request is unreasonable and should be denied.

CONCLUSION

WCWD has not abused its discretion as to the service boundary issues and accordingly, Dr. Cooksey's complaint and request for relief fails. The entry of a consistent order is respectfully prayed.

This 27th day of February, 2014.

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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 27th day of February, 2014, forwarded by U.S. Mail to the following:

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June 25, 2012

Magistrate Doc Kaelin
Warren County Courthouse
429 E. 10th Avenue
Bowling Green, Kentucky 42101

Via Hand Delivery

Re: Warren County Water District Amendment of Service Areas

Dear Magistrate Kaelin:

At your request, I have reviewed the validity, legality and enforceability of certain actions taken by the Warren County Water District, a water district formed by the Warren Fiscal Court pursuant to KRS 74.010. Pursuant to my review of the relevant facts, I render the following opinion, which I agree can be sent to Attorney General Jack Conway for review.

I was, specifically, asked to review and form an opinion concerning the joint resolution adopted on August 3, 2006 by the Warren County Water District ("WCWD"), and Bowling Green Municipal Utilities ("BGMU"). This document is referred to as an "Agreed Sewer Service Area Boundary Map" as the jurisdictional limits for sewer service for these two utilities. You also asked that I review another joint resolution dated June 19, 2007 whereby a "water service boundary" was adopted as the jurisdictional limits for water service by the respective utilities.

It is my opinion that, while the information contained above is accurate, there was no attempt to change the territorial boundary which was established by Warren Fiscal Court in 1975. These Resolutions, based upon my understanding after review of the documents and discussion with Mr. Hamp Moore, the attorney for the Warren County Water District, and Mr. Tim Edelin, the attorney for the Bowling Green Municipal Utilities, were to establish service areas for the two services (water and sewer). As I have said in the past, the term "territorial boundaries" and "service areas" are not synonymous. In Case 2009-00190, Cooksey vs. BGMU Board and Warren County Water District, page three, footnote 11 of the Order discusses this very issue. See attached Order. (Warren County Attorney's Exhibit A) I believe this Order is most helpful with regard to the issues presented in your letter.

EXHIBIT
tabbies
A

It appears the Resolutions essentially allow BGMU and WCWD to agree upon service areas for the WCWD within the long established territorial boundaries of the WCWD. The two agencies appear to be merely establishing service areas within the territorial boundaries. Territorial boundaries may only be changed by following the procedures set forth in KRS 74.110. A review of the records in Warren Fiscal Court reveal no changes with regard to the territorial limits have taken place since 1975.

It is my opinion Fiscal Court only has the authority to set territorial boundaries. I know of no legal authority or requirement for the Fiscal Court to take action concerning service areas.

I hope my letter is helpful to you and General Conway. If you need additional information, please contact me.

Sincerely,

Amy Hale Milliken
Warren County Attorney

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

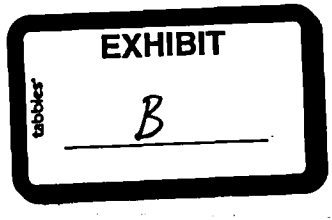
ORDER

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 96[1] 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 customers[4] 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

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

[3] *See* http://www.bgmu.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 District[12] - 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

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[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

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[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

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[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

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[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.

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[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

Honorable Keith M Carwell
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Warren County Water District
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employees, while members of the system and desiring to run for political office, must resign and terminate their employment with the state. Your office has indicated that your internal management state police manual [see KRS 13.080(3)(a); the manual of statements of internal management does not involve administrative regulations as envisioned by KRS Ch. 13] requires an officer to resign his position before announcing his candidacy.

(4) A regulation providing for a leave of absence for a police officer to run for office would be in conflict with KRS 16.170. That statute prohibits an officer of the department [see Acts 1974, Ch. 74, Art. V, §24(4)] (now Bureau of Police) from running for office. (Emphasis added.) Thus the prohibition extends to a state policeman so long as he is a member of the State Police Merit System, regardless of whether he is on some kind of leave or on regular active duty. The state policeman is either an officer of the Bureau or he is not. There are no intermediate situations. A leave of absence is a temporary absence from duty, but it does not involve a termination of employment and tenure. A leave of absence connotes continuity of the employment status. Bowers v. American Bridge Co., 43 N.J.Super. 48, 127 A.2d 580, 585; Southwestern Bell Tel. Co. v. Thornbrough, 232 Ark. 929, 341 S.W. 2d 1; and Thompson v. Young (D.C. D.C.), 63 F.Supp. 890, 891. A leave of absence is not a complete separation from employment. It connotes a continuity of employment status, during which time performance of duties of his work by an employee and remuneration by the employer and other fringe benefits may be suspended. Chenault v. Otis Engineering Corp., Tex. Civ. App., 423 S.W.2d 377, 383. The leave of absence of a state policeman, though involving no pay, fringe benefits, or duty, does not involve a termination of employment or tenure. The prohibition of KRS 16.170 clearly applies to a state policeman on leave. There is no such thing as "temporary termination of employment." The employee's employment is either terminated or it is not. For this reason the constitutional issue about the First Amendment is resolved above in connection with the prohibition against running for office, while a member of a merit system, as interpreted by the Supreme Court of the United States. KRS 16.170 covers the state policeman except where his employment has been terminated.

OAG 75-719

PUBLIC UTILITIES - Discrimination as to rates or service; utility defined
PUBLIC UTILITIES - Water district, a public utility

SYLLABUS: 1. Water district must serve all inhabitants within its certificated area.

2. As to extension of water lines to serve an applicant within the certificated area, the Board of Commissioners have a discretion which exercise will not be reversed by the courts or Public Service Commission except where the board's action is shown to be arbitrary or fraudulent.

To: Benjamin J. Lookofsky, Graves Co. Attorney, Courthouse, Mayfield, Ky.
By: Charles W. Runyan, Asst. Dep. Atty. Genl., December 16, 1975

You request our opinion as to whether a water district can refuse water service to individuals requesting it for houses constructed within the district. We assume you refer to a water district created under KRS Chapter 74 [such a district is a political subdivision; Louisville Extension Water Dist. v. Diehl Pump & Supply Co., Ky., 246 S.W.2d 585 (1952)]. Any such water district is, by virtue of KRS 278.015, a public utility and is subject to the regulatory control [rates and service] of the Public Service Commission in the same manner and to the same extent as any other utility as defined in KRS 278.010.

KRS 278.170(1) reads:

> "(1) No utility shall, as to rates or service, give any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage, or establish or maintain any unreasonable difference between localities or between classes of service for doing a like and contemporaneous service under the same or substantially the same conditions."

The general rule is stated in 12 McQuillin, Municipal Corporations (1970), §34.89, p. 211:

> "It is universally held that a public service company, or a municipality which performs the duties of a public service company, insofar as the services requested are reasonably within its range of performance, must furnish a supply or service to any applicant within the prescribed territory * * * and cannot unjustly discriminate between patrons." (Emphasis added.)

"The view has been expressed that a municipality distributing water to its inhabitants is under a duty to supply water to all the inhabitants of the community who apply for the service and tender the usual rates. . . ." Ibid., §35.35e, p. 471.

Judge Cullen, in City of Bardstown v. Louisville Gas & Electric Co., Ky., 383 S.W.2d 918 (1964), pp. 921-922, wrote this as to the Kentucky rule of service responsibility:

> "Subject to the qualification hereinafter stated, our view also is consistent with the proposition supported by a number of authorities that the scope or area of service obligation of a public utility is limited to the extent of its profession, holding out or dedication of service. See State ex rel. Ozark Power & Water Co. v. Public Service Commission, 287 Mo. 522, 229 S.W. 782; California Water & Telephone Co. v. Public Utilities Commission, 51 Cal.2d 478, 334 P.2d 887; 43 Am.Jur., Public Utilities and Services, Sec. 22, pp. 586-588. The qualification is that under our view the scope or area of profession, holding out or dedication is fixed, not by what the utility actually chooses to do, but by the terms of the certificate of convenience and necessity."

However, the certificate of convenience must be examined together with the district's documents as to the geographical territory to be served. See KRS 74.010 as to territory to be included in a water district, and the county court's role in determining the service area boundaries. See also KRS 74.012 as to the Public Service Commission's role in determining necessity for a water district and the geographical area sought to be served.

"The primary duty of a public utility is to serve on reasonable terms all those who desire the service it renders; and it may not choose to serve only the portion of the territory covered by its franchise which is presently profitable for it to serve." 64 Am. Jur.2d, Public Utilities, §16, p. 562. See also Southern Union Gas Co. v. New Mexico Pub. Serv. Com'n, 84 N.M. 330, 503 P.2d 310 (1972).

It has been held that the extent of service which a public utility has professed to give is a question of fact and not of law. Utah Power & Light Co. v. Public Service Commission, Utah, 249 P.2d 951 (1952); and Town of Beloit v. Public Service Comm., 34 Wis.2d 145, 148 N.W.2d 661 (1967).

The Supreme Court of Wisconsin in Town of Beloit, above, was of the opinion that the scope of the undertaking of the utility could be determined by a profession of services in a number of ways including contracts, maps, tariffs filed with state agencies or from the conduct and practices of the utility with or without regard to existing maps. However, the Kentucky Court of Appeals has narrowed the scope of service obligation to the extent of its profession or holding out, as fixed by the terms of the certificate of convenience and necessity. City of Bardstown, above, p. 922. See KRS 278.020 as to certificate of convenience and necessity.

It must be noted that the right to demand or receive utility service does not rise to the level of a constitutional right or entitlement from the state. See Jackson v. Metropolitan Edison Company (U.S.C.A.-3, 1973), 483 F.2d 754. This decision was affirmed by the Supreme Court at 42 L.Ed.2d 477 (1974).

The answer to your question is that the 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. This is subject to the condition that applicant tender the usual rates and comply with the usual contractual terms as a user and with reasonable rules and regulations of the district.

Your second question is whether the water district is under a duty to borrow money to implement service to the subject applicant.

Some jurisdictions have held that a public service company is under a duty to furnish to all persons applying therefor the service which it offers without discrimination and at reasonable rates, where the service requested is within the reasonable range of its plant, equipment, lines or mains. See Homeowners Loan Corp. v. Mayor and City Council, Md., 3 A.2d 747 (1939). However, the Kentucky rule does not follow that holding precisely.

While the Kentucky Court of Appeals has recognized that ordinarily a mandamus or mandatory injunction will lie at the instance of a consumer to compel a water company to extend its mains to any part of the city where its franchise requires it to

operate, there are limitations on that principle. The right to such relief 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. See KRS 74.100 as to extensions of mains of a water district.

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 certificated 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 reasonableness of the board's action can be measured in terms of the certificated area, the new area to be served, the need and cost of such extension, the financial impact [including return in revenue] of the extension upon the public service company, and the impact upon the total service available to the general public of the certificated area. The interest of a few must be carefully weighed against the interest of the general public in the certificated area of service. Of course, the district must treat all applicants similarly situate alike. Johnson v. Reasor, Ky., 392 S.W.2d 54 (1965), 56. This calls for adherence to any fixed standards. See annotation at 48 ALR 2d 1222, §3; and 64 Am.Jur.2d, Public Utilities, §§43, 44, and 238. The reasonableness of such proposed extension would involve largely many factual elements which could be initially determined upon complaint [where the service is refused] under KRS 278.260 and upon a formal hearing by the Public Service Commission pursuant to KRS 278.280. The commission's action is subject to court review under KRS 278.410 and final appeal to the Court of Appeals [KRS 278.450].

OAG 75-724

COUNTY BUDGET - Transfers between funds
LOBBYISTS - Definition

SYLLABUS: 1. Fiscal court can authorize one of its members to lobby in Frankfort on county bills.

2. The expenses of the magistrate may be paid out of county treasury if properly budgeted.

To: G. Anthony Mills, Hopkins Co. Attorney, Courthouse, Madisonville, Ky.
By: Charles W. Runyan, Asst. Dep. Atty. Genl., December 22, 1975

The Hopkins Fiscal Court has authorized one of its magistrates to appear in Frankfort to lobby for legislation favorable to Hopkins County. No funds were appropriated for that purpose.

BGMU Bowling Green Municipal Utilities
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February 17, 2014

Mr. John Dix, General Manager
Warren County Water District
523 U.S. Hwy 31-W Bypass
Bowling Green, KY 42101

Dear John,

The purpose of this letter is to memorialize past conversations and meetings between Bowling Green Municipal Utilities (BGMU) and Warren County Water District (WCWD), including BGMU/WCWD Joint Engineering, Planning, and Financing Committee meetings, regarding sewer interceptor capacity in and along the Cemetery Road corridor.

During those conversations and meetings, BGMU presented and discussed the results of a collections system hydraulic analysis along the Cemetery Road corridor performed by Gresham Smith and Partners (GSP). The GSP study identified several interceptor and manhole surcharging conditions resulting from drainage basins served by the Cemetery Road sewer interceptor. The study analyzed BGMU- and WCWD- served sewer territory as they exist today and took into account planned development with the basins.

Because of the surcharging conditions identified in the analysis, BGMU has concluded that no additional service area in and along the wastewater drainage basins served by the Cemetery Road sewer interceptor can be accepted. Should additional service territory be requested to be served by the Cemetery Road sewer interceptor (including, but not limited to, the back portion of the Dr. Roy Cooksey farm), an engineering study would be required and capacity additions would be borne by the requesting utility.

Should you have any questions regarding this letter or the GSP study referenced herein, please feel free to contact me or Mike Gardner and we can discuss further.

Sincerely,

BOWLING GREEN MUNICIPAL UTILITIES

Mark Iverson
General Manager

EXHIBIT
tabbies
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