

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

CARROLL COUNTY WATER DISTRICT NO.1)
)
COMPLAINANT)
)
VS.)
)
WHITEHORSE DEVELOPMENT CO.)
)
INTERVENING COMPLAINANT)
)
VS.)
)
GALLATIN COUNTY WATER DISTRICT)
)
DEFENDANT)

RECEIVED

DEC 20 2007

PUBLIC SERVICE
COMMISSION

CASE NO. 2007-00202

BRIEF FOR COMPLAINANT
CARROLL COUNTY WATER DISTRICT NO. 1

Comes now the Defendant Carroll County Water District No. 1 (hereinafter "CCWD#1"), and for its Brief in response to this Court's Order entered November 26, 2007, state as follows:

PROCEDURAL HISTORY

CCWD#1 filed a Complaint with the Public Service Commission (hereinafter "PSC") on May 21, 2007, as a result of Defendant Gallatin County Water District's (hereinafter "Gallatin") intrusion into the territorial boundaries of CCWD#1 for the alleged purpose of providing water to potential users along Kentucky Highway 1039 near its intersection of Interstate 71, including, but not limited to, Intervening Complainant Whitehorse Development Co. (hereinafter "Whitehorse"), without a Certificate of Public Convenience and Necessity. CCWD #1 sought injunctive relief to

CRAWFORD & BAXTER, P.S.C.
ATTORNEYS-AT-LAW
CARROLLTON, KY

halt the construction of the water line pending a decision of the PSC. At the hearing on CCWD#1's request, Gallatin entered into an Agreed Order that "...during the pendency of this proceeding, Gallatin shall not construct any water lines within the territory of (CCWD#1) and shall not allow a third party to connect to its existing water line within the territory of (CCWD#1)".¹ PSC Order entered August 1, 2007.

A hearing on the merits of the CCWD#1's Complaint was held on November 1, 2007. Twelve (12) witnesses testified on behalf of the parties. The parties were then requested to file written briefs on the merits of the case no later than December 20, 2007.²

STATEMENT OF FACTS

CCWD#1 is a public water district created in accordance with KRS 74.010 et seq., which operates in portions of Carroll, Owen and Gallatin Counties. Complaint at 1. Service to Gallatin County was initiated in 1984, when the Gallatin County Judge Executive requested water service from CCWD#1 because it had no water access, and its territorial boundary was expanded to include a portion of Gallatin County. James L. Smith, Transcript of Evidence (hereinafter "T.E.") at 29. To serve the new area, CCWD#1 constructed a new water tank, booster pumps and water lines with financing from a bond issue through the United State Department of Agriculture's Rural Development Office³ of approximately \$1,208,000.00, of which \$736,000.00 remains unpaid. Id.

¹The Order further prohibited Gallatin from furnishing and/or selling water from its existing water line within the territory of CCWD#1 to any customers not served by Gallatin as of July 18, 2007. PSC Order of August 1, 2007.

²PSC Order entered August 17, 2007, and. PSC Order entered November 26, 2007.

³Rural Development was previously called the "Farmers Home Administration". Smith T.E. at 32.

at 31. Additional improvements to the Gallatin County section of CCWD#1 have included the construction of a pumping station, the installation of a new 150,000 gallon elevated tank, with water pipelines and a booster station, at a total cost of outstanding indebtedness attributed to Gallatin County of \$1,636,00.00.⁴ Id. at 32.

By Orders of the Carroll, Owen and Gallatin County Fiscal Courts, respectively, dated September 8, 1998, CCWD#1's boundaries were realigned at which time CCWD#1 acquired the exclusive right to supply water service to the territory as described in the Orders.⁵ Id. at Exhibit A; Smith, T.E. at 25. CCWD#1 has 2,951 customers, twenty-one percent (21%) percent of whom are in Gallatin County, twenty-eight percent (28%) are in Owen County, and the remainder in Carroll County. Id. at 24. Its Board of Commissioners represents members from all three (3) counties, including two (2) from Gallatin County. Id. at 24.

In 2002, and unbeknownst to CCWD#1, Gallatin constructed an eight (8) inch water line from the Kentucky Speedway through the farm of Patsy Keeton,⁶ and to Highway 1039 where it ended, approximately 12,000 feet, at a cost of \$61,000.00, without a Certificate of Public Convenience and Necessity from the PSC. Morris Courtney, T.E. at 148; Vic Satchwell, T.E. at 233-234; Gastineau, T.E. at 260-261; Smith, T.E. at 28. Minutes of Gallatin's meetings reveal that at the time of the construction, no one was requesting water service within this area, and that Gallatin

⁴A 1999 project for an extension in Gallatin County cost \$150,000.00, of which \$120,000.00 remains unpaid. A complete list of the bond indebtedness to Rural Development is found at Answer 14 of the PSC's questions to CCWD#1.

⁵Reference is made to Exhibit A to CCWD#1's Complaint for the complete legal description of its territorial boundaries.

⁶Mrs. Keeton is the sister of Gallatin Board Member, now Chair, Vic Satchwell. He leases the farm from his sister. Satchwell, T.E. at 234-235.

deliberately proceeded without a Certificate of Public Convenience and Necessity in a clandestine manner, despite known legal issues of invading another water district's territory, and its fiscal responsibilities of spending money for a dry, 'dead end line' where it had no existing customers. Courtney at 147; 150; 156; 159. It is undisputed that the running of this eight (8) inch line through the Keeton farm onto Highway 1039 is within the physical territorial boundaries of CCWD#1. Smith, T.E. at 27; 45 - 47.

Moreover, although it had a debt on other water line construction projects and required a rate increase to operate its system, Gallatin cashed a certificate of deposit to use for the cost of building the line, even though it has no potential users, or actual revenues to be generated by the line. Courtney, T.E. at 149. Further, from the time of construction, through and including the PSC hearing, not only were there no customers along this eight (8) inch water line, no one had even applied to Gallatin to be served by the line — not even Whitehorse or Love's Country Store (hereinafter referred to as the "truck stop"), the purchaser of a portion of the Whitehorse lands.⁷ Id. at 157.

James L. Smith, CCWD#1 Manager, learned of Gallatin's proposed construction to extend its eight (8) inch line approximately 1,700 feet from the Keeton property to the proposed site of the truck stop when it applied to the Kentucky Division of Water. Smith, T.E. at 27. A permit was issued on April 10, 2007, by the Division to Gallatin, and French's Backhoe, a business owned by Gallatin's former Board Chair Denny French, and now the Gallatin County Deputy Judge-Executive, was contracted to dig the new water line. Courtney, T.E. at 158-159. Through

⁷Gallatin does not serve any property or the Stewart farm property north of Interstate 71. Courtney, T.E. at 195.

hearsay information, Smith contacted Adam Chaney, a Whitehorse partner, and learned that the truck stop development would require 10,000 gallons of water per day. Smith, T.E. at 38; CCWD#1's Exhibits 7, 8, and 9. No mention was made of any sprinkler system, nor any mention of a need for 'fire water'.⁸ Id. Neither Whitehorse, nor the truck stop owners, applied for water service from CCWD#1. Id. at 39.

Mr. Smith testified that CCWD#1 could provide all of the 9,600 gallons per day of water needed by the requirements of the truck stop as evidenced by the letter from MTF Engineering dated September 21, 2007, filed by Gallatin with the PSC. Smith, T.E. at 40. There was no mention of a need for any sprinkler water or any fire water needs, as the only water use was 'sanitary', Smith testified. Id. at 43. Using CCWD#1's four (4) inch line that is approximately 4,700 feet away from the proposed service area, Smith explained that even a 10,000 gallons per minute demand would not challenge the four (4) inch water line. Id. To confirm this fact, he monitored the pressure on a minute-by-minute basis for a ten (10) day period straight near the end of the four (4) inch line. Id. Monitoring then confirmed that CCWD#1 can supply the truck stop at approximately 105 pounds, and thus exceed the Kentucky regulations which require maintenance of a minimum of thirty (30) pounds. Id. at 44. To supply this truck stop, CCWD#1 would extend its existing pipeline to the site, and sanitize it, and provide water within a couple of months. Id.

Adam Chaney, a partner with Whitehorse, confirmed that Love's truck stop had the day immediately prior to the PSC hearing, officially purchased an eighteen (18) acre parcel from the fifty-one (51) acres it owns on both sides of Highway 1039. Chaney, T.E. at 276. While attempts

⁸Gallatin Engineer Ron Gastineau confirmed that Love's Truck Stop's engineering report contained no reference to a need for fire protection service. T.E.at 273.

to sell its land had been on going since 2000, the sale to the truck stop was the first by Whitehorse since its purchase of the land. Id. at 292. In fact, at the time of the hearing, there were no potential purchasers of the remaining tracts, and the partners of Whitehorse themselves had no plans to build on the site, or to open a business at this site. Id. at 292. Whitehorse itself had not applied for water service from CCWD#1 or Gallatin, and would not ever apply for water service unless it actually built a building. T.E. at 298.

Mr. Chaney did not know of any actual requirement of the truck stop for fire protection at the site, but ‘assumed’ that there would be fire suppression needs. Id. at 296; 324. Whitehorse offered Richard Carr who opined that a truck stop, a seventy (70) room hotel and a strip center consisting of three (3) shopping center buildings at the site could not be served by CCWD#1 because of an alleged need for fire protection service. Carr, T.E. at 313-314. This ‘conclusion’ was reached despite the fact that there was no evidence of such a project under contract to be built, much less a similar project on the other side of the road, which accounted for he determined a ‘combined’ need of 22,000 gallons per day at the total site. T.E. at 316. He admitted, however, that the only actual customer for the site, namely the truck stop, only needed 9,600 gallons per day, and did not request water for a sprinkler system or fire protection service. Id. at 314-315. And, that if nothing was ever built at the site, then there would be no need for water service at all. Id. at 317-318.

In spite of the PSC Order preventing construction of the water line in dispute, Gallatin allowed French’s Backhoe to proceed with the extension of the water line to the truck stop site. Donna Marlin, Environmental Control Manager of the Drinking Water Branch of the Division of Water, testified that the April 10, 2007, permit for this disputed water line extension was issued to Gallatin, and not for another entity, to construct a line in the same location. Marlin, T.E. at 141. If

someone other than Gallatin was constructing the line, it would be required to obtain a permit from the Division for that purpose. Id. It is undisputed that French's Backhoe did not have a permit to extend the Gallatin water line. Construction took place at the site for approximately one (1) week before Gallatin told him to stop when CCWD#1 complained to Gallatin's attorney that it was violating the PSC Order. Courtney, T.E. at 175-176; French, T.E. at 232.

LEGAL ARGUMENTS

I.

GALLATIN VIOLATED PSC REGULATIONS WHEN IT EXTENDED THE EIGHT (8) INCH LINE INTO CCWD#1'S TERRITORY

A. THE PSC HAS JURISDICTION OVER THIS DISPUTE

The jurisdiction of the Public Service Commission of Kentucky to consider this dispute should not be at issue. KRS 278.015 provides that all water districts are subject to the PSC jurisdiction. KRS 278.260(1) statutorily grants unto the PSC the right to hear complaints about the "service" of a utility. "Service" is defined by KRS 278.010(11) 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".

Providing new service to the public, or the new construction of any plant, equipment, property, or facility for the furnishing to the public water service cannot occur without first obtaining a certificate of convenience and necessity issued by the PSC pursuant to KRS 278.020(1). As stated in City of Cold Spring vs. Campbell County Water District, Ky., 334, S.W.2d 269, 274, (1960),

controversies between persons or corporate bodies engaged in a public utility enterprise concerning the right to construct new facilities to serve a particular customer or class of customers ... are within the jurisdiction of the PSC upon the application which a utility makes pursuant to KRS 278.020 for a certificate of public convenience and necessity. "... (T)he (PSC) is pre-eminently qualified to determine which of ... two competing political subdivisions is best qualified to, and should serve (a certain) area. This is the business of the Commission, and is not a matter for the original jurisdiction of the courts." Id. at 273. Thus, there should be no question that the issues presented before the PSC by CCWD#1 fall strictly within its jurisdiction.

B. GALLATIN'S FAILURE TO PROCURE CERTIFICATE OF CONVENIENCE OF NECESSITY VIOLATES PSC REGULATIONS

As stated above, KRS 278.020 requires a water district that is constructing or extending its plant, equipment, property or facility anew, must first make application to the PSC. 807 KAR 5:001 Section 9 explains the procedure for the application, and mandates that the water district explain "... (t)he facts relied upon to show the proposed new construction is or will be required by public convenience and necessity". Further, the names of all public utilities, corporations or persons with whom the proposed new construction or extension is likely to compete must be given. Id. at (2)(c). Only if the proposed extension does not "... conflict with the existing certificates or service of other utilities in the same area and under the jurisdiction of the commission that are in the general area in which the utility renders service or contiguous thereto ...", is an exception made to the requirement to obtain the certificate. Id. at (3).

Gallatin has admitted in these proceedings, as CCDW#1 has alleged, that it was newly constructing an eight (8) inch water line from its own territorial boundaries into the territorial

boundaries of CCDW#1. This construction cannot be considered a simple extension of its own water lines which is exempted from the certificate requirement, as Gallatin was not seeking to improve its existing service to its customers, or even to provide water to a customer within its territorial boundaries which was not then being served. Instead, it was expending funds to move its water lines into the territorial boundaries of another water district on speculation that some day someone would want water service, and it would 'be there first' to provide the requested water. No one can deny that CCWD#1, as another water district subject to the jurisdiction of the PSC, was 'in the general area' of the Keeton property – in fact being across the road from the farm, and that the Gallatin extension would physically move that district into the territorial boundaries established in accordance with the provisions of KRS 74.110 by the agreement of the Carroll, Gallatin and Owen Counties' Fiscal Courts to be those of CCWD#1. Had Gallatin followed PSC regulations it would have first sought the needed certificate, and CCWD#1 would have been notified of its request as a water district operating in the same area or contiguous thereto so it could assert its authority and ability to serve the 'new area' sought by Gallatin. Instead, Gallatin attempted to sneak its extension past the watchful eyes of the PSC and in direct contravention to the principles established through its regulations to only allow new construction where 'public convenience or necessity' requires it. Obviously, Gallatin could not meet this burden as it had no actual customer to serve for its \$61,000.00 expenditure for a 'dead end' or dry line, and it knew that the PSC would not approve its request. Thus, it ignored applicable regulatory requirements and constructed as it wanted, in clear detriment to its existing customers who paid for the dry line, and to the detriment of CCWD#1 which had already incurred extensive debt to serve that section of Gallatin County. Clearly, the PSC cannot allow Gallatin to subvert its regulatory authority and proceed how and where it chooses in

contravention of its regulations. As Gallatin had no certificate of convenience and public necessity which is a regulatory prerequisite to new construction, the eight (8) inch water line extension should be considered illegal and in violation of PSC regulations, and Gallatin should be prohibited from using the extension for any purpose whatsoever, including service to Whitehorse and/or Love's Truck Stop. Also, penalties should be assessed in accordance with KRS 278.990.

C. CCWD#1'S REQUEST FOR GALLATIN TO STOP CONSTRUCTION CAN BE DETERMINED BY THE PSC

At its first hearing before the PSC, questions were raised as to the legal authority of the PSC to grant injunctive relief to the CCWD#1. While admittedly, its enabling legislation provides no provision to the PSC to issue injunctions, the PSC is empowered by KRS 278.040(1) to enforce the provisions of KRS Chapter 278. At the same time, its enumerated powers allow it to make regulations which have the full force and effect of law. See, Union Light, Heat & Power Co. vs. Public Service Commission, Ky., 271 S.W.2d 361 (1954).

The failure of Gallatin to construct a new line without a certificate of public convenience and necessity places it in violation of PSC rules and regulations. As a water utility subject to its jurisdiction, the PSC can order Gallatin to stop construction on its water line extension until such time as it obtains the required certificate. In effect, this would 'enjoin' Gallatin from proceeding further with its current construction, and would have the same effect as an injunction on Gallatin's action. While CCWD#1's request for the PSC to take action may not be in the formal nature of an 'injunction', the substance of its Motion, and the actions from the PSC that it seeks, is to require Gallatin to cease and desist its new construction as it has not obtained the required certificate, and, in CCWD#1's view, could not meet the requirements pursuant to 807 KAR 5:001,

Section 9. Accordingly, PSC can effect the relief requested by CCWD#1, regardless of whether its has the injunctive powers which are not specifically enumerated by statute.

II.

A. CCWD#1 HAS THE EXCLUSIVE RIGHT TO PROVIDE WATER SERVICE WITHIN ITS SERVICE TERRITORY

A water district can only exercise the powers which are granted to it by statute. KRS 74.010 gives exclusive jurisdiction to a fiscal court to create a water district as an entity of county government, in accordance with the provisions of KRS 65.810. The specific territory to be included in the water district must be identified and described. A county court can strike off any part of the territory which will not be benefitted by being in the water district. KRS 74.010. The establishment of a water district requires the PSC within the parameters of KRS 74.012 to "... make a finding and determination of fact that the geographical area sought be served by the (proposed water district) cannot be feasibly served by an existing (water district)". KRS 74.012(3).

Acquiring a water supply line or water system within the district is allowed pursuant to KRS 74.100. Similarly, the territorial limits or boundaries of a water district can only be enlarged or diminished in accordance with KRS 74.110. Only upon the written request and the authority of Fiscal Court may a water district extend into an adjoining county pursuant to KRS 74.115. At the same time, the legislature gave water districts the legal power to condemn as set out in KRS 74.090.

The legislative system for establishing the requirements by which a water district can operate and where physically it can provide services to its customers establishes an exclusive service area for a water district. The provisions of KRS Chapter 74, when read together, 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. “Territorial” and “boundary” limitations to the operation of the water district are specifically defined. One can only conclude from these statutory provisions that the legislature intended the water district to be granted an exclusive service area in which to provide water.

Indeed, this implied grant of the exclusive service area to a water district is emphasized by KRS 74.010. If a water district could operate anywhere, then why would the legislature require a specifically described boundary to be identified by the fiscal court seeking the creation of the water district? And why can the boundaries of a water district only be enlarged or diminished in accordance with KRS 74.110 if it was not intended to be an ‘exclusive boundary’ for a water district in which to operate? The only statutory provision for one water district operating within the other water district’s territory is provided by KRS 74.410 when two or more water districts form a water commission to jointly operate their respective sources for the supply of water as set out in KRS 74.430. See, also, OAG 63-666.

Moreover, if it was not understood that a water district has the exclusive right to operate within its territorial boundaries, then would not the matter have been litigated? A review of existing Kentucky case law interpreting this statute reveals not one single case where one water district challenged the territorial integrity of the boundaries of another water district. While the case of City of Cold Spring vs. Campbell County Water District, Ky., 334 S.W.2d 269 (1960), discusses the legal authority of a city municipality and a water district to serve territory within the water district’s boundaries that was outside the city’s limits, it is inapplicable to this case before the PSC.

Cold Spring, *supra*, did not discuss the exclusive right to furnish water by one statutorily-formed water district by a county government entity that has specific designated

boundaries, within the confines of another water district's legally established territorial boundaries by a fiscal court. Instead, the PSC faced the question in proceedings for a certificate of public convenience and necessity, as to whether a city municipality has the legal authority to serve anywhere within the water district territory, regardless of whether or not the water district even intends to or will furnish the requested service. Id. at 271. Without a doubt, the Cold Spring decision did not address the basic legislative authority granted to water districts to serve their territorial boundaries as established by the fiscal court when another water district seeks to intrude into that boundary. Instead, the decision relied upon the provisions of KRS 96.150 which gives a city unrestricted statutory authority to furnish water service within five (5) miles of its city limits. The Court concluded that this statute giving the City of Cold Spring the right to sell water in this area was in effect before the water district in question was even created. Due to this precedence, the Court of Appeals allowed Cold Spring to sell water in the water district's territory. Id. at 272.

At the same time, the PSC must consider that the fiscal courts which determined the physical territorial boundaries of CCWD#1 and Gallatin created each of these water districts to serve separate and distinct physical areas. When the lands of more than one county are involved, the fiscal courts of all affected counties participates in the decision. KRS 65.810; KRS 74.115. The fiscal court of Gallatin County, along with Carroll and Owen, granted unto CCWD#1 the exclusive right to operate in the boundaries as set forth in their Orders in 1998. No steps have been taken since that time to reduce CCWD#1's boundaries or to change its legal authority to operate.

Moreover, Gallatin must acknowledge that there is no statutory authority for it to operate outside of its own territory. KRS 74.020(3) requires the PSC to determine the geographical area which a water district seeks to serve, cannot be 'feasibly served' by an existing water supplier.

The proposed water district has to petition the fiscal court for approval to exist, and must describe the 'service area including "... a metes and bounds description of the area of the proposed district". KRS 65.810. Thus, there is no legal authority for a water district to operate outside of its legally authorized boundaries. See, Olson vs. Preston Street Water District No. 1, Ky., 163 S.W.2d 307 (1942). Therefore, Gallatin has no legal authority to operate outside of its defined territory as established by the Gallatin Fiscal Court. Accordingly, it cannot be allowed to serve within CCWD#1's territorial boundaries as Gallatin lacks the statutory right to serve outside of the physical boundaries established by the county order which determined its boundaries, and the PSC authority which granted it the right to operate within those stated boundaries. See, City of Georgetown vs. Public Service Commission, Ky., 516 S.W.2d 842 (1974).

B. FEDERAL LAW FURTHER CONFIRMS CCWD#1'S EXCLUSIVE TERRITORY

The Consolidated Farm and Rural Development Act, Title III, Subsection 306(b), codified as United States Code, Title 7 as 1926(b), provides that to protect the integrity of the federal government's outstanding loans, a water system's territory cannot be forcibly annexed, nor 'cherry picked' by another water district system or municipality. The CCWD#1 is entitled to the protection of these provisions as: 1.) it is an 'association' within the meaning of the Act; 2.) it has outstanding indebtedness with the United States Department of Agriculture; 3.) it has the legal right to provide the water service through established territorial boundaries; 4.) it can make service available in the disputed area; and 5.) the disputed area is within the established service district of the CCWD#1.

It cannot be questioned that CCWD#1 is an association protected by the Farm Act, nor that it owes USDA for debt incurred for the construction of water lines and/or the operation of

the system. Further, it is undisputed that the area sought to be served is within the physical boundaries of the water district, and that it has the legal right to serve the customer within that boundary. While neither Whitehorse nor the truck stop have applied for water from CCWD#1, there is a four (4) inch water line approximately 4,700 feet from the truck stop that can provide the 10,000 gallons per day as required for operation of Love's. In Le-Ax Water District vs. City of Athens, 346 F.3d 701 (6th Cir. 2003), the court explained that to have the protection of this Act, a water utility must have water lines within or adjacent to the property to be served, and that it must be able to serve the area within a reasonable time after the service is requested. As James L. Smith, CCWD#1 Manager testified, CCWD#1 can serve the truck stop in approximately two (2) months after service is requested with the existing four (4) inch line. The extension of its existing line would be in the ordinary course of business to serve an entity needing water service within its territorial boundaries. Accordingly, CCWD#1 is entitled to the protection of the Consolidated Farm and Rural Development Act, and Gallatin has no authority to proceed to serve water within CCWD#1's territorial boundaries.

III.

CCWD #1 READY, WILLING AND ABLE TO SERVE THE TRUCK STOP

When, and if, Love's Truck Stop applies for water service from CCWD#1, the District will be ready, willing and able to meet the truck stop's needs for sanitary water. Whitehorse has no need, and no expressed present intention of ever seeking water service from any entity, and thus its speculation as to what will be needed when, and if, it sells additional real estate should not be considered. While Whitehorse has 'pie in the sky' aspirations of selling additional land for a

hotel or shopping center development, the facts as presented to the PSC clearly establish that the land in question has gone idle for nearly seven (7) years. The recent purchase by Love's of a portion of the Whitehorse property further does not confirm further development to the area. As James L. Smith testified, he viewed the proposed site of the truck stop and saw no activity. In his own words, the area was 'dead'.

At the same time, the PSC has to question whether Love's Truck Stop is concerned about water service at all. First, it has not applied to either CCWD#1 or Gallatin for service. Second, if it was concerned about water service, it did not intervene before the PSC to present its interests. And third, it did not join in Whitehorse's "emergency" Motion for service to be allowed at the site during the pendency of this proceeding.

Water lines are not built upon speculation, as Mr. Smith explained, but upon the fact that a real customer will sign a water user agreement for a water supply at a definite site. Similarly, the PSC cannot speculate upon what may come to the area, but must instead review what allegedly the truck stop actually needs to operate.

Indeed, the best evidence of what Love's must have to operate is indicated by the engineering report which was filed as an exhibit by Gallatin to its answers to questions propounded by the PSC. That report, as discussed by Mr. Smith in his PSC testimony, confirms that only 9,600 gallons of water per day will be required for operation of its newly constructed facility. No request or need for fire protection or fire suppression is mentioned in the report as being required. No request is made by Love's for even a fire hydrant capable of 500 gpm as Whitehorse contended. Mr. Smith confirmed that the CCWD#1's four (4) inch line could provide the requested volume of water

without any problem at the psi that exceeds state regulations. Accordingly, CCWD#1 has demonstrated that it is ready, willing and able to serve the truck stop, if it is asked.

Whitehorse seeks to disqualify CCWD#1 from serving the site on the contention that Love's needs water suppression, regardless of the report that its MTF Engineering submitted. First, it should be noted that Whitehorse has no legal standing to complain about the CCWD#1's ability to serve Love's Truck Stop. While it may be an intervening party, it is not the real party in interest in this proceeding. Whitehorse has not applied for water from either water district and testified it had no present intentions to do so. Further, Whitehorse is not the legal representative of Love's Truck Stop, nor did it present any documentation evidencing its ability to proceed on behalf of the truck stop, or in the truck stop's interest. It is simply a real estate developer trying to make its own land attractive to a future purchaser by contending that the PSC must consider 'future possible sales of its real estate' that have not materialized over the last seven (7) years since it purchased the land in 2000.

At the same time, Whitehorse is incorrect about the requirements of the truck stop facility, and its opinions must be ignored by the PSC. Without a doubt the PSC must carefully review MTF Engineering's specifications of September 21, 2007, for the construction of a truck stop consisting of retail space plus office space which encompasses 4,400 square feet, instead of relying upon Whitehorse's misrepresentation as to what those needs are and what is required by 'state law'. First, there is no state-mandated fire suppression requirement for a building of the size of this proposed truck stop. Indeed, the 2006 International Building Code provides that a restaurant has to be greater than 5,000 square feet, or have an occupant load of more than three hundred (300) people before Kentucky law mandates any form of fire suppression. See, Fire Protection Systems, Chapter

3 “Use and Occupancy Classifications”, Section 303, Assembly Group A; Section 903, Kentucky Office of Housing, Building & Construction. At the same time, retail space and/or office space must exceed 12,000 square feet to require any form of fire suppression. Id. As the proposed truck stop is only 4,400 square feet in totality, it does not fall within ANY state mandate to have fire protection system and/or fire suppression. Since the MTF Engineering did not request fire protection and/or fire suppression for this facility, it must have known the requirements of Kentucky law, and that fire suppression was not an issue for its truck stop client. The PSC cannot allow Whitehorse who is not representing Love’s, nor is seeking water itself, to raise a ‘red herring’ when one does not exist. The discussion of fire protection is completely irrelevant to the undisputed testimony that CCWD#1 can provide in excess of 9,600 gallons of water to meet the water needs of the proposed truck stop. As there is no state requirement for fire suppression, the PSC must focus on what is documented as required for this project by the very engineers who designed the 4,400 square foot building, and not place any reliance upon misrepresentations of ‘the law’s requirements’ which Whitehorse alleges to serve its own financial interests.

IV.

GALLATIN IS IN CONTEMPT OF THE PSC ORDER

It is clear from a review of the PSC Order of August 1, 2007, that Gallatin was not to continue construction of the water line pending a decision of the PSC, nor allow a third party not then served by it to obtain water from its system. Gallatin had the only permit from the Kentucky Division of Water to construct a line through Patsy Keeton’s farm along Highway 1039 to the Whitehorse property. It knew that French’s Backhoe was at the site constructing the line in violation of the PSC Order, and had been working there as Mr. French testified for ‘about a week’ before

Gallatin was caught by CCWD#1 in the act on September 18, 2007⁹, and notification given to its counsel of the violation of the PSC Order. Gallatin cannot escape culpability by claiming that ‘it did not know’ what was going on, as Mr. French testified that he had called Gallatin’s Superintendent, Morris Courtney, and told him that he was working on the water line along the highway. To quote Mr. French’s testimony at the hearing, “... I told them (Gallatin) when we (were) going to start, the day that we started digging.” French, T.E. at 217 (emphasis added). He further explained, “(Gallatin) came out and inspected the line from time to time ...” during the construction. Id. at 216. Further, Mr. French continued on the project until Gallatin was caught in the act, and Morris Courtney came out and stopped his employees. Id. at 217. It was Gallatin that had the state permit to do the job, not French¹⁰, and it was Gallatin that was a party to the PSC Order prohibiting further construction during the pendency of this action. Accordingly, Gallatin must be found in contempt of the PSC’s Order for its flagrant violation of its terms, and fined accordingly.

CONCLUSION

For the reasons stated herein, the Carroll County Water District No. 1 requests the Public Service Commission of Kentucky to enforce its rules and regulations and determine that the Defendant Gallatin County Water District has constructed water lines without the requisite certificate of public convenience and necessity, and has violated the territorial boundaries of CCWD#1 as established by its own fiscal court, and as approved by this Commission. As Gallatin has no legal

⁹Further reference is made to the affidavit of James L. Smith attached as Exhibit 1 to CCWD#1's Motion to Show Cause and the photograph attached as Exhibit 2 to the affidavit.

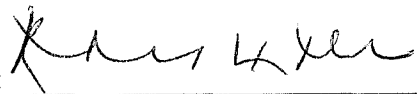
¹⁰The PSC should report French to the Kentucky Division of Water for its admitted construction of the water line without a permit to do so in violation of Kentucky law.

authority to operate outside of its stated territorial boundaries, there is no legal reason why its actions in constructing a covert eight (8) inch water line within the physical boundaries of CCWD#1 should be tolerated.

At the same time, Whitehorse Development Group, LLC, cannot be allowed to determine what, if any, service Love's Truck Stop needs or is required by law to have to operate at the site it purchased. Whitehorse is not operating the truck stop business, or any business at this site for that matter. Love's has not even been concerned about needing water, as it has not even applied to either the CCWD#1 or Gallatin for water service. Thus, the Commission is faced with only speculation on Whitehorse's part as to what is or is not needed for this proposed customer of CCWD#1. Water districts don't build lines on speculation, because speculation doesn't pay for the cost of construction water lines. Similarly, the Public Service Commission should not allow speculation to govern its decision in this matter.

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CERTIFICATE OF SERVICE

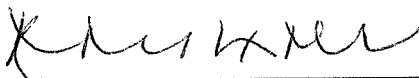
This is to certify that a true and correct copy of the foregoing Brief was mailed postage prepaid, on this the 20th day of December, 2007, to:

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