COMMONWELATH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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IN THE MATTER OF:

CARROLL COUNTY WATER DISTRICT NO. 1)
COMPLAINANT)

VS.) CASE NO. 2007-00202

WHITEHORSE DEVELOPMENT CO.)
INTERVENING COMPLAINANT)

VS.)

GALLATIN COUNTY WATER DISTRICT)
DEFENDANT)

POST-HEARING BRIEF FOR DEFENDANT, GALLATIN COUNTY WATER DISTRICT

Comes now the defendant, Gallatin County Water District (hereinafter GCWD), by counsel, and respectfully submits the following as its post-hearing brief of this action:

I. Legal Issues

The Carroll County Water District No. 1 (hereinafter Carroll) complains that GCWD has unlawfully invaded its rightful and exclusive territory and intends to infringe upon its exclusive right to serve customers situated within that area. The focal point of the dispute is that area situated at the intersection of I-71 and Ky. Hwy. 1039 in Gallatin County, Kentucky.

A portion of that land area is currently undergoing development for purposes of installation of a truck stop and related facilities. The developer, being the intervening complainant herein (hereinafter Whitehorse), expresses intentions of further developing the remainder of the site.

A. PSC Jurisdiction

The concept of established, certified territories reserved to the exclusive service by a provider is not foreign to utility regulation. But, it does not apply to water providers.

The General Assembly enacted a statutory scheme for certification of defined territories reserved to designated electricity providers (KRS 278.016 et seq.). No corresponding statutory provision for creation of exclusive territories assigned to water providers exists in KRS Chapters 278 or 74, or otherwise. Certainly, it may be reasonably inferred that had the legislature intended to create such, it would have done so. It has not.

Moreover, the Courts have recognized that existing utilities have no right to be free from competition [Ky. Utilities Co. v. PSC, 390 S.W.2d.168(Ky. 1965)], and that a grant of territory to a water provider is not the grant of an exclusive right to serve [City of Cold Spring v. Campbell County Water Dist., 334 S.W.2d.268(Ky. 1958)]. Let us bear in mind throughout that the land area in question is unserved.

As a creature of statute, the PSC possess only that authority to act granted by the legislature. In keeping with that principle, the PSC has declined to decide, for lack of jurisdiction, disputes of the very nature now before it. City of

Hawesville v. East Daviess Co. Water Assn., Case No. 2004-00027, 2004 Ky. PUC Lexis 216; City of Lawrenceburg v. So. Anderson Water Dist., Case No. 96-256, 1998 Ky. PUC Lexis 526; Auxier Water Co. v. City of Prestonsburg, Case No. 96-362.

Carroll cites no authority supporting the contention that it possesses an exclusive right to serve the area and potential customer in question. To date, it has cited only Olson v. Preston St. Water Dist. No. 1, 163 S.W.2d.307(Ky. 1942). That case is inapt to the issues at hand. It holds that a water district may not purchase and acquire existing systems lying outside of its territory, which is a fact situation not analogous to the instant action. Indeed, it is doubtful that the Olson case would be decided in the same way today in light of Hamrick v. City of Ashland, 321 S.W.2d.401(Ky. 1959), and KRS 74.280, which appears to authorize the very action invalidated in the Olson case.

For the foregoing reasons, Carroll's complaint should be dismissed as failing to state a claim upon which relief can be granted, in that (1) the PSC lacks the legal authority and jurisdiction to resolve this dispute, and has consistently so held in the past, and (2) Carroll has no legal right to exclusively serve the area in question. The PSC is authorized to regulate water utilities with respect to rates and quality of service. City of Lawrenceburg, supra. This is not such a case. Carroll would like to assert that the instant action is not a "territorial dispute". The facts and holdings of the above-cited cases before the PSC say otherwise.

B. Certificate of Public Convenience and Necessity (COCN)

Carroll promotes itself as the self-appointed arbiter of when a COCN is required. GCWD would submit that the issue is not so clear-cut and would require an extensive trial on that subject alone to determine. GCWD has acted under the exemption provided by KRS 278.020(1) related to ordinary extensions of existing systems in the usual course of business. Its line in question was laid in 2002 in order to meet anticipated water service needs on a farm which it had served since circa 1997. There is nothing in the evidence indicating that the installation of this line contravenes any of the indices defining the said exemption set out in 807 KAR 5:001(9)(3).

In any event, this question is immaterial to the resolution of Carroll's complaint. See City of Hawesville, supra.

II. FACTUAL ISSUES

Throughout, Carroll has attempted to portray GCWD as somehow incompetent, surrepticious in its actions and less than forthright. At the hearing, counsel for GCWD termed these claims to be disingenuous. The word was not lightly chosen.

Consider:

a. Carroll continues to brazenly assert that it has exclusive rights that do not exist in any reported authority or statute.
b. Carroll presumptuously takes GCWD to task with an immaterial argument related to a COCN supported by neither law nor fact.

c. In support of its position, Carroll, in its response to PSC's discovery request, cites KRS 74.155, which deals with expansions into adjoining counties and is wholly inapplicable to the case at hand.

d. Having expended considerable time and energy to locate, review and compile meeting minutes requested by the PSC, GCWD, for its trouble, enjoyed the pleasure of having them read back to it at the hearing. An occurrence it fully anticipated.

Sadly, Carroll was not afforded the same privilege as it saw fit to produce no minutes in response to the PSC's inquiry, citing lack of understanding of a poorly, in its view, worded interrogatory. At trial, however, Mr. Smith stated that no minutes were produced because no discussions of matters he deemed to be of concern to the PSC ever took place at Carroll's board meetings [Transcript of Evidence (T.E.), p. 94, l. 11-25]. Therefore, as Mr. Smith is a man of deadly honesty, we can rightfully conclude that the GCWD waterline laid in 2002, now so bitterly complained of, was not deemed by Carroll to be important enough to even discuss, until now, despite the fact that its superintendent Lykins, having personally laid the line, knew about it in 2002 (T.E., p. 94, l. 15-25, p. 95, l. 1,2), and its manager, Mr. Smith, learned about it from Mr. Lykins in 2003 (T.E., p. 91, l. 18-25; p. 92, l. 1-15; p. 203, l. 3-11; p. 207, l 25; p. 208, p. 209, l 1-9).

Furthermore, since the interrogatory propounded by the PSC asked for minutes dating back to January 1, 1996, we can conclude that

nothing relative to the matters now complained of by Carroll has ever been deemed worthy of discussion by its board.

Contrary to the notion that the two districts' respective boundaries were well known by all concerned, and held sacrosanct, there appears to have been more than a little confusion on all sides of the issue (T.E., p. 202, l. 21-25, p. 203, l. 1,2, p. 224, l. 5-25; p. 254, l. 8-15).

e. Carroll seems to imply, if not state outright, that GCWD has somehow sneaked into its claimed territory at various times throughout the years, as if under cover of night. Yet, the evidence illustrates that the subject lines installed in 1996, 1997-98 and as late as 2005, were probably known to Carroll at the time of installation, and, if not, then shortly thereafter, and Carroll made and harbored no objection to any of them. Indeed, these projects appear to have had Carroll's blessing, especially the 2005 one (T.E., p. 91, l. 4-17; p. 92, l. 16-25; p. 93, l. 1-22). We might infer that GCWD relieved Carroll thereby from an onerous duty to serve all residents within its claimed territory [KRS 278.280(3)].

As for the critical line in question laid in 2002, it is difficult to fathom what GCWD might have done to more clearly inform Carroll of its actions than to hire Carroll's superintendant to do the work (Mr. Lykins, the Carroll superintendent, also did work on the 1997-1998 project, which incidentally provided service to the farm on which lies the commercial development now at issue).

For Carroll to deny that it acquiesced and participated in the 2002 line extension and had knowledge of same, when its high-level employee and agent actually physically installed it, and its existence was known to its manager since 2003, and no complaint having been heard until now, defies reason. And if it were so upset by this, to the point of being unable to even speak of it at a meeting, why did it so graciously bless GCWD's further extension into its claimed territory in 2005? Is not the knowledge of Carroll's superintendent imputed to it?

f. In support of its original motion for an injunction, Carroll filed an affidavit stating that GCWD was "currently" constructing line in its territory. This is patently untrue. GCWD has laid no such line since 2002.

g. Carroll continues to boldly pronounce that it is presently ready, willing and able to provide water service to the site in question. Yet, clearly it is neither ready nor able to do so. It is 4700' away from the site with a 4" line. It cannot provide service without the expenditure of significant, wasteful and unnecessary sums of money, as much as $400,000.00, as well as a senseless expense of time.

h. In its pleading Carroll belittles the development potential of the site in question. Yet, Mr. Smith testified that the commercial development of the area is, and has been, clearly foreseeable, (T.E., p. 103, l. 17-25; p. 104, l. 1-20; p. 75, l. 16-21). Hence, its recent interest in the area.

There is a disconnect between Carroll's written submissions and the testimony of its agents.

i. Carroll cites its significant investment in Gallatin County, but fails to disclose, until cross-examination, that several of its lines in Gallatin County were funded, wholly or partially, by the Gallatin Fiscal Court and/or GCWD (T.E., p. 72, l. 15-25; p. 73; p. 203, l. 17-25; pp. 204, 205, 206), including the very line through which it now proposes to serve the site in question (T.E., p. 204, l. 15-25; p. 205, l. 1-20). It also has constructed very little line in Gallatin County since 2000 (T.E., p. 205, l. 1-20), and none near the area in question (T.E., p. 80, l. 20-25; p. 81, l. 1-4).

   Mr. Smith stated that Gallatin County had a duty to look after their residents. True enough, and it has done so. Carroll also has a duty to serve its residents [KRS 278.280(3); T.E., p. 97, l. 17-25], which it has willingly abdicated to GCWD whenever such suited its purposes. No evidence was heard about Carroll sharing its revenue derived from lines paid for by others.

j. Carroll presumes to challenge GCWD's financial decisions and condition and rate structure without any evidence whatsoever calling any of same into question.

   The 2002 line was constructed at a cost of approximately $61,000.00 paid from liquid funds on hand at a time when, it may be judicially noticed, interest rates were markedly low.

k. Meanwhile, Carroll protests that the loss of this potential customer (and others that may, but probably won't, be ultimately located at the site), will impair its ability to repay its bonded indebtedness. This is an assertion difficult to explain in terms of good faith. Under cross-examination we learn that not only is Carroll in good financial health (T.E., p. 82, l. 23-25; p. 83, l. 1), the bonds in question are revenue bonds, payable from the revenues produced by the projects they financed, and issued, supported and sold on the basis of the soundness and ability of the projects to service the bonded debt. (T.E., p. 81, l. 5-25; p. 82; p. 83, l. 1-5) Their repayment is not dependent upon any new projects or revenues generated from same. If this is not the case, then Carroll is not in such fine financial shape after all, and it has made certain miscalculations with regard to its issuance of bonds. We can be sure that neither of those situations exist.

l. Carroll invokes the Consolidated Farm and Rural Development Act of 1961 for the proposition that it is statutorily prohibited, as a debtor of the USDA, Rural Development, from ceding any of its territory or assets.

A reading of Lexington-South Elkhorn Water Dist. V. City of Lexington, 93 F 3d.230(C.A. Ky. 1996) discloses that the protection Carroll seeks under that Act is not triggered by the facts of this case (no service made available, no COCN issued or applied for, no request

for service, no customers, no facilities constructed, etc. T.E., pp. 79, 80.)

In any event, despite its perceived statutory admonition against ceding its land and "rights" to others, it has done so at least four times in the past, to wit; to GCWD in 1998 and 2005 in Gallatin County, and to Carrollton Utilities Co. in locations at U.S. Hwy. 42 and U.S. Hwy 227 in Carroll Co. (T.E., p. 83, l. 6-25; pp. 84-87). So, which is it? Does the Act not provide the protection insisted upon in this action? Or, does it so provide and Carroll has simply ignored it as seen fit in the past?

m. When learning that line was being constructed along Hwy. 1039 from the site in question toward the terminus of GCWD's 2002 line, Carroll fired off an inflammatory motion, with affidavits, seeking to hold GCWD in contempt of an agreed order, in what appears to be nothing more than an effort to portray the GCWD in an unfavorable light before the PSC.

GCWD draws that conclusion from the following; (1) no evidence was presented indicating the GCWD had any direct involvement in the laying of this line, or participated in it ,or paid for it, or had any knowledge that the contractor was ostensibly operating under a permit previously issued to it, or knowingly did anything in violation of its agreed order, if, in fact, any such violation even occurred, (2) the evidence indicates that this line was undertaken by Whitehorse, (3) the

entire misunderstanding could have easily been cleared up by a simple phone call, (4) Carroll chose to make its motion for a rule rather than even attempt to resolve the matter informality, (5) at such time as GCWD was notified that its permit was being employed, it acted immediately to effect a cessation of that work (T.E., p. 176, l. 9-16; p. 217, l. 20-25), (6) in that GCWD moved promptly to remedy the situation, there was no line being laid at the time of Carroll's motion; which therefore served no purpose other than to play "gotcha", (7) which is especially true in light of the fact that the line installation has admittedly caused no injury to Carroll (T.E., p. 63, l. 21-23), and (8) that the developer (Whitehorse) might undertake to construct line from its site to the GCWD line, and that GCWD could not prevent such from happening, was expressly discussed by the parties in front of the PSC in connection with the general discussion related to the agreed order at the time of the first appearance of this action before the PSC in July, at which time Carroll did expressly state that it had no objection so long as the lines were not connected (which has not occurred).

Carroll professes an unclear memory of having stated its lack of objection to the developer constructing line up to GCWD's line. GCWD stands upon the video and audio record before the PSC.

n. Carroll doggedly pursues its interests herein in utter derogation of the interest of the customer, the party it and GCWD exist to serve. In so doing, Carroll presumes to tell Whitehorse what it needs, what it wants,

what it'll get and when, what its plans and intentions are and should be, and even hazards speculation on its prospects for success. Somehow reason has been consumed by selfishness in this matter.

III. CONCLUSION

By application of the legal considerations discussed above, Carroll's complaint should be dismissed. It holds no recognized exclusive right to serve the area in question and the PSC has no jurisdiction over the subject matter of this dispute and no legal authority to resolve it.

As to the facts of the case (which are superfluous in view of the legal posture of the claim), the equities which emerge clearly favor GCWD. If the purpose of utility regulation be to promote efficient, reliable, economical service, and, toward that end, to avoid waste and duplication of effort, cost and facilities, then the unavoidable answer to the question posed herein is that GCWD should serve the area. It can sufficiently do so almost immediately at virtually no costs to anybody. The same cannot be remotely said of Carroll's current position.

GCWD suspects that Carroll does not expect the PSC to order Whitehorse to purchase water from its 4" line. Rather, it is anticipated that Carroll will propose that GCWD be ordered to sell water to Carroll through its 8" line constructed in 2002, which Carroll will in turn sell at retail to Whitehorse and provide by way of the line recently constructed by Whitehorse. This would explain Carroll's lack of any real concern over the construction by Whitehorse of the line along Hwy. 1039 leading to GCWD's line. That construction doesn't hurt

Carroll at all, as it has admitted. It will actually help its argument for the resolution suggested above.

Carroll has made no preparation, upgrade or expenditure whatsoever with an eye toward the eventual provision of efficient, adequate and economical water service to the subject site, despite the need for same being foreseeable for the past several years. What Carroll seeks to do is exploit the foresight and capital outlay of GCWD, and the expenditures and forced desperation of Whitehorse, to its financial advantage. It attempts to maneuver itself into an advantageous position without assuming any cost or risk whatever. A fine bit of irony in that its own superintendent constructed the line, at GCWD's cost, it now seeks to usurp to its own gain.

Now, Carroll has argued that it has been wronged by illegality, and to allow GCWD to serve the site would perpetuate the wrongful illegality. To this GCWD responds; what wrong, what illegality?

With respect to the "illegality" assertion, GCWD will not belabor the PSC with a recitation of its arguments set forth hereinabove related to exclusivity of territory, COCN's and the exemption from the requirement of same, except to say that Carroll's arguments in this regard are misplaced, ill-conceived, unfounded and unsupported by legal authority.

As to GCWD having somehow wronged Carroll, the only thing it has done to Carroll is undertaken to serve customers it had no desire to serve. Carroll has shown little zest for expanding water service to remote Gallatin Countians on its own nickel. Until now it has registered no complaint whatsoever about any

incursion into its claimed territory. In fact, it does not today make any real complaint about any such line, not even the latest one done in 2005, other than the 2002 line. It should be obvious that the only reason it now finds that line so objectionable is the prospect of new commercial users at I-71 and Hwy. 1039. If it was aggrieved by any of these water lines, and with particularity the 2002 line, it should have complained years ago. After all, even Mr. Smith knew of the 2002 line as of 2003.

Carroll's strategy might be surmised as, let GCWD build its 8" line at its expense; we'll even supply the labor to do it; after its built and paid for, we may be able to use it for our purpose, without having put anything into it. Carroll has waived any right to complain and should be estopped from so doing now. It has slept on its rights (if any there be), while GCWD expended its funds, and now seeks to benefit from GCWD's effort and expense. To allow this would be inequitable, especially since Carroll has acquiesced in this sort of activity at various times since 1996. Louisville Asphalt Co. v. Cobb, 220 S.W.2d.110 (Ky. 1949); Barrowman Coal Corp. v. Kentland Coal & Coke Co., 196 S.W.2d.428 (Ky. 1946).

The fact of the matter is that these two districts have historically been cooperative and mutually helpful. GCWD's activities, now complained of, have until now received the, at least tacit, blessing of Carroll. The root of this dispute is obvious. The law and the equities fall on the side of GCWD under the circumstances presented herein. GCWD has not taken, nor does it seek to take, any customer from Carroll. The area in question is not served by Carroll. GCWD

has no desire to steal anything from Carroll. It believed that it had the right to serve the area, as it was already providing service closer thereto than was Carroll. It made preparations to be ready to serve the area when the anticipated need arose. It was interested in getting there before Carroll, believing that if Carroll became better prepared to serve the area, it might make the same arguments GCWD now makes; and thus take away from GCWD that which it considered itself to be entitled. As the General Assembly has not deigned to create exclusive territories for water providers, equity would seem to dictate that the first in time prevails. City of Jenkins v. Cury, 347 S.W.2d.85 (Ky. 1961).

IV. RESPONSE TO CERTAIN STAFF ATTORNEY INQUIRIES

At this point, counsel for GCWD wishes to respond to certain inquiries propounded by staff counsel during the hearing. While these inquiries may not be germane to the ultimate resolution of the complaint before the PSC, an effort to satisfy the interest of staff counsel follows.

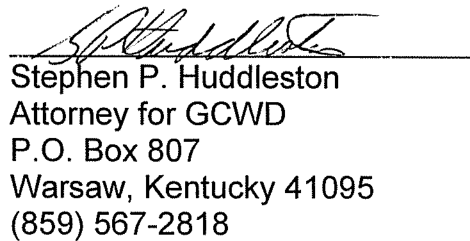
First, staff counsel inquired of Vic Satchwell, current GCWD board chairman, whether he recused himself from consideration of whether to construct the 2002 line through the property of his sister, Keeton. Minutes of the GCWD board meeting held September 13, 2001, submitted to the PSC as a discovery response, indicate that Satchwell did recuse himself from that determination. Satchwell was not chairman at the pertinent time.

Secondly, staff counsel inquired of various GCWD board members whether resort to KRS 74.110 for purposes of annexing the disputed area was considered. In fact, such was considered by the undersigned counsel at some

point subsequent to 2003. While there is a paucity of precedent on this subject upon which to rely, it is, in all candor, uncertain whether KRS 74.110 is available under these circumstance (OAG 63-666). What is reasonably certain is that resort to that statute would have resulted in litigation, producing no improvement over the present situation.

GCWD chose its course with the hope that reason might prevail and litigation be avoided altogether.

Respectfully submitted,



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CERTIFICATION

This is to certify that the foregoing was served by mailing a true copy of same by first class mail, postage prepaid to Hon. Ruth H. Baxter, P.O. Box 353, Carrollton, Kentucky 41008, and Hon. Dennis R. Williams, P.O. Box 861, Covington, Kentucky 41012-0861, this the 18th day of December, 2007.