

# Adams

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Reply to: Covington

December 19, 2007

RECEIVED

DEC 20 2007

PUBLIC SERVICE  
COMMISSION

Commonwealth of Kentucky  
Public Service Commission  
Attention: Filings  
211 Sower Boulevard  
Frankfort, KY 40601

RE: Carroll County Water District, No. 1 v. Whitehorse Development Co. vs. Gallatin County  
Water District  
Case No. 2007-00202

Dear Sir or Madam:

Enclosed please find an original and 11 copies of Intervening Complainant's Post-Hearing Brief. Please file same and return to me a filed stamped copy in the self-addressed, stamped envelope enclosed for your convenience.

If you have any questions or comments, please feel free to contact me.

Sincerely,

ADAMS, STEPNER,  
WOLTERMANN & DUSING, P.L.L.C.

*Dennis R. Williams*  
Dennis R. Williams

DRW:smg  
Enclosure

Cc: Ruth H. Baxter  
Stephen P. Huddleston

Reply to: Covington

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COMMONWEALTH OF KENTUCKY  
PUBLIC SERVICE COMMISSION  
CASE NO. 2007-00202

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IN RE: The Matter of:

CARROLL COUNTY WATER DISTRICT, NO. 1 : CASE NO. 2007-00202  
:   
Complainant, :   
Vs. :   
WHITEHORSE DEVELOPMENT GROUP, LLC :   
:   
Intervening Complainant, :   
Vs. :   
GALLATIN COUNTY WATER DISTRICT :   
:   
Defendant. :


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**INTERVENING COMPLAINANT, WHITEHORSE DEVELOPMENT GROUP, LLC'S  
POST-HEARING BRIEF**

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Comes now the Intervening Complainant, Whitehorse Development Group, LLC, by counsel, and hereby submits its Post-Hearing Brief.

Respectfully submitted,



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## **I. INTRODUCTION AND PROCEDURAL STATUS**

The Carroll County Water District No. 1 (“Carroll County”), brought the instant action on May 21, 2007, seeking a declaratory judgment and injunctive relief. The case originated when a dispute arose between Carroll County and the Gallatin County Water Districts (“Gallatin County”) as to who has the right to supply water service to an area lying in Gallatin County, but in the Carroll County Water District service area. The subject area consists of land at the intersection of Interstate 71 and Kentucky Highway 1039 (hereinafter referred to as “development site”). Currently, the subject area is undergoing commercial development that requires immediate water service.

This matter was heard by the Public Service Commission’s hearing officer on November 1, 2007, with all parties offering testimony regarding the issues raised before the Public Service Commission (“Commission”). At this hearing a briefing schedule was established. On November, 5, 2007, Carroll County filed a motion requesting an extension of time for the parties to file their respective post-hearing briefs. However, a water connection was needed prior to the anticipated time for decision by the Commission. As a result, Whitehorse filed an Emergency Motion on November 13, 2007, in order to insure that water service would be provided to the development area. Thereafter, on November 20, 2007, Carroll County filed a Response in opposition to Whitehorse’s Emergency Motion. In response, Whitehorse briefly addressed the arguments presented by Carroll County in a Reply. On November 26, 2007, the Commission issued an Order extending the time to file post hearing briefs until December 20, 2007.

## **II. FACTUAL BACKGROUND**

The Intervening Plaintiff, Whitehorse, remains the owner of over thirty (30) acres at the development site<sup>1</sup>. Whitehorse has recently closed with Love's Travel Stop and County Store ("Love's") selling to them approximately twenty acres which has been prepared for development in reliance on the availability of utilities. Tr. 277. At the present time both Carroll County and Gallatin County seek to provide water services. However, only Gallatin County has the current capacity and ability to serve the subject site. Tr. 112-114.

Gallatin County began constructing water lines within Carroll County's Territorial boundary in 1995. The first water line was laid in 1995 and ran along Highway 35. Tr. 88. This line was laid in order to serve customers on Old Gould Road and 271 that were not receiving water service from either county. Tr. 184. Following the completion of this line, Gallatin County constructed a second water line to serve the Park Ridge Road area. *Id.* This line was laid in approximately 1997 and extended down Highway 465 into the Lick Creek area. Tr. 90. A third line was laid within Carroll County's territory in 2002. Tr. 91. Finally, in 2005, a fourth and final line was laid along Highway 465 within Carroll County's territory. Tr. 92. The aforementioned water lines were constructed in the outlying and unprofitable regions of Carroll County's territory. Furthermore, none of the lines constructed by Gallatin County ever served an existing customer of Carroll County. Tr. 182. As a result, no complaints regarding such lines were received until November of 2006, over ten years since the first line was laid. Tr. 183. It just so happens that Carroll County's complaint regarding such lines was filed only after it has become apparent that site is profitable for water districts to serve.

At the present time, the facts show clearly that only Gallatin County has the current capacity and ability to serve the development site needs. Gallatin County currently has in the

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<sup>1</sup> Whitehorse continues to market and offer for sale to other commercial uses of the site.

ground and maintains an eight-inch line less than three-hundred (300) feet away from connection to a line to the development site. Tr. 229. In contrast, Carroll County has not lines in the ground close to the development site, but maintains a four-inch water line that is some four thousand seven hundred (4,700) feet away, which can not meet the estimated water flow needed for the development with fire suppression. Tr. 46. For Carroll County to even begin to meet such needs, the evidence at the hearing was that it would have to construct a 100,000 gallon water tank, on some unknown location, at a cost of \$400,000.00. Tr. 68-71. The evidence further reflected it would take approximately one (1) year to construct this tank, if a location and funding were even available. Tr. 114.

On July 18, 2007, prior to Whitehorse intervening, the Commission held a hearing on Carroll County's motion to prohibit Gallatin County from constructing water lines and servicing the water needs of the development. During the course of the hearing, both Carroll County and Gallatin County agreed to two conditions. The first condition prohibited Gallatin County from constructing any water lines within the territory of Carroll County and also prohibited Gallatin County from allowing third parties to connect to its existing water line within the territory of Carroll County. The second condition mandated that Gallatin County would not furnish or sell water from its existing line within the territory of Carroll County to any customers not served by Gallatin County as of July 18, 2007. On August 1, 2007, the Commission issued an Order that required Gallatin County and Carroll County to follow the agreed upon conditions. The resulting effect of this Order is to deny any users located, or to be located at the development site, to receive any type of water service.

### **III. LEGAL ARGUMENTS IN SUPPORT OF GALLATIN COUNTY'S REQUEST TO SERVE THE DEVELOPMENT SITE**

Carroll County's Complaint must be dismissed because the Public Service Commission does not have subject matter jurisdiction to resolve territory disputes between water districts. *Georgetown v. Public Service Com.*, 516 S.W.2d 842, 845 (Ky. 1974). In the event the Public Service Commission does have jurisdiction, Gallatin County must be permitted to provide water service to the development site in order to promote equity and efficiency, and to avoid wasteful duplication and needless expenditure of both private capital and public funds.

#### **A. CARROLL COUNTY'S COMPLAINT MUST BE DISMISSED BECAUSE THE PUBLIC SERVICE COMMISSION DOES NOT HAVE SUBJECT MATTER JURISDICTION TO RESOLVE THE TERRITORY DISPUTE BETWEEN CARROLL COUNTY AND GALLATIN COUNTY**

Before the Public Service Commission can consider the merits of a complaint, it must first determine if the Commission has jurisdiction over the dispute. *City of Lawrenceburg, Ky. v. South Anderson Water District*, Case No. 96-526, (Ky. P.S.C. June 11, 1998). The Commission is "a creature of statute and has only such powers as have been granted to it by the General Assembly." *City of Hawesville, Ky. vs. East Daviess County Water Assoc. Inc.*, Case No. 2004-00027 (Ky. P.S.C. March 25, 2004) (quoting *Boone County Water & Sewer Dist. v. Psc*, 949 S.W.2d 588, 591 (Ky. 1997). In accordance with KRS 278.0401(1), the Commission has the authority to regulate public utilities and to enforce provisions of KRS Chapter 278. However, the power to regulate public utilities extends only to rates and services. KRS 278.040(2). ***More specifically, KRS Chapter 278 does not authorize the Public Service Commission to establish or enforce exclusive service territories for water utilities.*** See *City of Hawesville, Ky.*, Case No. 2004-00027 (Ky. P.S.C. March 25, 2004) (*See also Kentucky Utilities Co. v. Public Service*

*Com.*, 390 S.W.2d 168, 175 (Ky. 1965) (Stating that existing utilities have no right to be free from competition). Furthermore, “Neither KRS Chapter 96, which governs the operation and governance of municipal utilities, nor KRS Chapter 273, which governs water associations, conveys such authority to the Commission.” *Id.* at 4-5. As a result, the Commission lacks legal authority to resolve territory disputes. *See Georgetown*, 516 S.W.2d at 845 (Public Service Commission, “lacks any legal authority to resolve territory disputes that arise between municipal water utilities and public water utilities”) (*See also City of Lawrenceburg, Ky.*, Case No. 96-256 (Ky. PSC June 11, 1998) (Stating that Public Service Commission lacks any authority to resolve territory disputes that arise between municipal water utilities and public water utilities)).

The Commission does not have authority to establish or enforce exclusive service territories for water utilities. *City of Hawesville, Ky.*, Case No. 2004-00027 (Ky. P.S.C. March 25, 2004). In *Hawesville*, the City of Hawesville filed a complaint against East Davies County Water Association, Inc. (“East Davies”). *Id.* at 1. The complaint alleged that East Davies improperly provided water services to an individual that Hawesville previously served. *Id.* The sole issue presented to the court was whether the Commission had jurisdiction to resolve a territorial dispute. *Id.* More specifically, whether Hawesville had the exclusive right to serve an existing customer. *Id.* In making its determination the court determined that nothing in KRS Chapter 278 authorized the Commission to resolve a territorial dispute. *Id.* at 4. The court then proceeded to quote a section of *Georgetown* that stated, “***While it may be desirable that the Public Service Commission resolve this type dispute because of its expertise in this area, this is of legislative, not judicial, concern, and we feel compelled to follow the clear language of KRS 278.010(3).***” *Georgetown*, 516 S.W.2d at 845. In conclusion, the court ruled that the



Commission lacked subject matter jurisdiction to resolve territory disputes and dismissed Hawesville's complaint accordingly. *Id.* at 6.

The Commission lacks the legal authority to resolve the territory dispute between Carroll County and Gallatin County. *Georgetown*, 516 S.W.2d at 845. Just as in *Hawesville*, the instant case regards a dispute as to who is the proper party to provide water service to an individual. More specifically, Carroll County's complaint alleges that Gallatin County is attempting to provide water service to an entity that only Carroll County is permitted to serve. In *Hawesville*, Hawesville's complaint alleged the exact same issue. *City of Hawesville, Ky.*, Case No. 2004-00027 (Ky. P.S.C. March 25, 2004). The present case is also identical to *Hawesville* in that neither case regards the regulation of rates or services. Instead, the present case contains only one question, which party has the right serve the territory encompassed by the new development. The question of whether the Commission has jurisdiction to answer this question has already been answered in *Hawesville* and *Georgetown*. Accordingly, precedent clearly establishes that the Commission does not have subject matter jurisdiction and must dismiss Carroll County's Complaint.

**B. IN THE EVENT THAT THE PUBLIC SERVICE COMMISSION DOES HAVE SUBJECT MATTER JURISDICTION, GALLATIN COUNTY MUST BE PERMITTED TO PROVIDE WATER SERVICE TO THE DEVELOPMENT SITE**

**1. The Commission's Fundamental Principle of Avoiding Wasteful Duplication of Utility Services Requires that Gallatin County be Permitted to Serve the Development Site.**

Gallatin County must be permitted to serve the development site in order to avoid the wasteful duplication of utility facilities that would result if Gallatin County was not permitted to

serve the site. “The manifest purpose of a public service commission is to require fair and uniform rates, **prevent unjust discrimination and unnecessary duplication of plants, facilities and service** and to prevent ruinous competition. The **courts generally deny the right of utilities to duplicate service.**” *Olive Hill v. Public Service Com.*, 305 Ky. 249, 253 (Ky. 1947); overruled on other grounds, *McClellan v. Louisville Water Co.*, 351 S.W.2d 197, 198 (Ky. 1961).

No party can begin the construction of any plant, equipment, property or facility for furnishing water services to the public if it would result in wasteful duplication of facilities. In accordance with KRS 278.020(1), no party can begin the construction of any plant, equipment, property or facility for furnishing water services to the public without acquiring a certificate of public convenience and necessity (“certificate”), unless such extension is in the ordinary course of business. In order for a party to receive a certificate they must be able to establish that it will not result in a wasteful duplication of utility facilities. *Kentucky Utilities Co. v. Public Service Com.*, 252 S.W.2d 885, 890 (Ky. 1952). Furthermore, an extension is not in the ordinary course of business if it results in wasteful duplication. *In the Matter of: Natural Energy Utility Corp. v. Ky. Public Service Commission*, Case No. 2003-00422, 7-8 (Ky. P.S.C. Sept 1, 2004). Accordingly, construction that would result in a wasteful duplication of utility services or facilities is not permitted. “Wasteful duplication which, as defined in East Kentucky, embraces an excess of capacity over need, an excessive investment in relation to productivity or efficiency, or **an unnecessary multiplicity of physical properties.**” *Kentucky Utilities Co.*, 390 S.W.2d at 173 (citing *Kentucky Utilities Co.*, 252 S.W.2d 885 (Ky. 1952)).

Gallatin County must be permitted to serve the development site with its existing water line in order to prevent Carroll County from duplicating existing utility infrastructure. Gallatin County currently maintains an eight-inch (8) line approximately three-hundred (300) feet away

from connection to a line to the site. Tr. 229. Furthermore, this line is capable of meeting both the potable water needs and the fire suppression needs of the development site. In contrast, Carroll County maintains only a four-inch water line that is some four thousand seven hundred (4,700) feet away. Tr. 46. Additionally, Carroll County's four-inch line cannot meet the estimated water flow needed for the development with fire suppression. Tr. 68-71. For Carroll County to even begin to meet such needs, the evidence at the hearing on November 1 revealed that it would need to construct a 100,000 gallon water tank, on some unknown location, at a cost of \$400,000.00. *Id.* The evidence further reflected it would take approximately one (1) year to construct this tank, if a location and funding were even available. Despite all of the aforementioned facts, the most profound evidence of wasteful duplication is found in testimony from Carroll County's own Water District Manager, who stated, "If we, in fact, were to be asked to provide fire water to this area, we would simply state there's two ways we can do that. We can do that by purchasing water off of Gallatin County off of their 8-inch line or the other way we can do that is by erecting a tower." Tr. 69.

While Carroll County argues that Gallatin County needed a certificate of convenience and necessity for the construction of its line, this is incorrect. Gallatin County's water line is merely an extension in the ordinary course of business and therefore does not require a certificate of convenience and necessity. 807 KAR 5:001 § (9)(3) defines an extension in the ordinary course of business and reads as follows:

Extensions in the ordinary course of business. No certificate of public convenience and necessity will be required for extensions *that do not create wasteful duplication* of plant, equipment, property or facilities, or *conflict with the existing certificates or service of other utilities operating 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, and that do not

*involve sufficient capital outlay to materially affect the existing financial condition of the utility involved, or will not result in increased charges to its customers. (emphasis added)*

Construction of Gallatin County's water line meets all requirements for being an extension in the ordinary course of business and, therefore, does not require a certificate of convenience and necessity. More specifically, Gallatin County's construction of the waterline to the development site did not result in a wasteful duplication of plant, equipment, property or facilities. This is because there were no water lines in the area where Gallatin County's water line was laid or the development site. In addition, no other utility was operating in the same area. This is supported by the evidence which shows that Gallatin County has been servicing this area for the past ten years. Carroll County may claim to be operating in the same area, but in fact, Carroll County has no water line within 4,700 feet of the development site. Tr. 47. Furthermore, the line that Carroll County does have cannot structurally meet the needs of the development site. Tr. 111-112. Finally, the construction of Gallatin County's water line did not result in capital outlay that materially affected the existing financial condition of Gallatin County. Tr. 174. In fact, the water line cost only \$61,000 to construct and did not affect the water rates imposed by Gallatin County. *Id.* As a result, Gallatin County's water line meets all requirements of an extension in the ordinary course of business.

The Commission's fundamental principle of avoiding wasteful duplication of utility facilities must be adhered to. Permitting Gallatin County to serve the development site will prevent Carroll County from needlessly spending approximately \$400,000.00 to construct utility infrastructure that is already in place.

2. **Gallatin County Must Be Permitted to Provide Water Service to the Development Site because Carroll County's Four-Inch Water Line is Unable to Meet Fire Suppression Needs or to Accommodate Additional Water Needs Arising in the Near Future.**

Gallatin County is the proper party to provide water service because Carroll County's four-inch water line cannot meet the potable water and fire suppression needs of future end users at the development site. Carroll County's repeated claim that they can meet the water needs of the development site is not only wrong, but in complete contradiction with testimony provided by their own witness. Carroll County continues to state that they can meet the water needs of Love's because they can provide the 10,000 gallons of water per day that Love's is anticipated to use. However, such an assertion distorts the truth by failing to mention the fact that Carroll County cannot meet the state mandated fire suppression needs of Love's. Tr. 112.

It is undisputed that Carroll County's four-inch water line cannot meet the fire suppression needs that Love's requires. More specifically, fire suppression at Love's would require a fire hydrant capable of providing five-hundred (500) gallons of water per minute. Tr. 320. It is physically *impossible* for Carroll County's four-inch water line to provide five-hundred (500) gallons of water per minute. Tr. 320. Furthermore, an eight-inch water line is the minimum line size that can be connected to a water hydrant. Tr. 300-321. In fact, James L. Smith, Manager of Carroll County Water District No.1, stated the following,

I have said to everyone from day one, hour one, minute one, that a 4-inch line will not provide fire water in a fire hydrant and have a fire hydrant that could be certified through the state. It won't work. Tr. 111-112.

Mr. Smith went on to explain that in order to provide fire suppression service that could be certified through the State Fire Marshall's Office, Carroll County would be required to erect a water tank. Tr. 112. Such a water tank would cost approximately \$400,000.00 to construct. Tr. 113. Furthermore, Whitehorse and Love's would be required to fund approximately fifty percent

of the \$400,000.00 construction cost. Id. In contrast, Mr. Smith admits that Gallatin County's eight-inch line is capable of meeting fire suppression needs without any substantial financial expenditure. Id. Therefore, Carroll County's water line not only fails to meet the appropriate fire suppression needs, but also fails to meet the physical capability of being able to be connected to a water hydrant. As a result, it is evident that Carroll County cannot meet the water requirement needs of Love's without spending approximately \$400,000.00.

Additionally, Carroll County's four-inch water line is not capable of being adapted to meet sanitary sewer water requirements of future end users located at the development site. Tr. 326. Testimony established at the hearing confirmed that all parties agree future development at the site is expected, if not imminent. Tr. 75. As a result, serving not only the existing needs but also the future needs of the site is important to consider. As established, Carroll County's four-inch line can barely meet the sanitary water needs of the development site at the present time. Tr. 326. In fact, any development beyond Love's would result in the four-inch line being unable to meet the sanitary water needs. Id. The most likely remedy for such a situation would be for Carroll County to remove the four-inch line and replace it with an eight-inch line. Tr. 328. Thus, even if Carroll County could meet the present requirement needs, future development at the site would require Carroll County to expend massive sums of money to replace inadequate infrastructure.

In conclusion, it must be reiterated that no matter how many times Carroll County asserts to the contrary, the evidence as a whole clearly establishes that they cannot provide the required water services. As a result, Gallatin County is the only party **CAPABLE** of providing water services and therefore must be permitted to do so.

3. **Gallatin County's Request to Serve the Development Site Must be Granted because Only Gallatin County can Meet the Immediate Need for Water Service at the Development Site**

Once again, Carroll County continues to disregard evidence and asserts that there is not an immediate need for water service at the development site. In fact, Carroll County makes this assertion with full knowledge that both Love's and Whitehorse desperately need water service.

Love's has completed the purchase of land at the development site and is seeking to begin construction at the site as soon as possible. Tr. 294. However, construction of Love's facility cannot begin until a building permit has been acquired. Tr. 296. Such a building permit can only be acquired if Love's can establish that they have an appropriate fire suppression plan in place. *Id.* Love's cannot establish this because they have **NO** water service. *Id.* Thus, it is quite evident that Love's need for water service is immediate. Furthermore, construction cannot begin at the site until the subcontractors are capable of accessing water service. Tr. 287. Water service is needed by all of the subcontractors in order to proceed on construction of Love's facility. Tr. 287. In conclusion, Love's need for water service is not only immediate, but two fold.

Whitehorse is also in immediate need of water at the development site in order to facilitate the sale of the remaining land. As explained by Mr. Chaney, Whitehorse cannot sell the existing pads at the site until water service has been shown to be available. Tr. 284. The reason for such is that entities are not willing to gamble on whether or not they will be able to receive water service. This is because they understand that there is the possibility that they could end up like Love's. More specifically, they could expend great sums of money to purchase land and not be able to begin construction due to not having water services. Furthermore, although

Whitehorse is not currently building on the development site, Whitehorse does have plans to build on the site in the future. Tr. 292.

Carroll County's contention that there is not an immediate need for water service is erroneous and based upon the specious argument that no formal request for water service has been made. As indicated by Mr. Chaney, formal requests for water service are not made until the end user needs their water meter to be activated. Tr. 298. Despite the absence of a formal request, the need for water service has been clearly communicated to Carroll County. In fact, the need for water is so severe that Whitehorse independently funded and began construction of a water line extension from the development site towards the nearest water line connection. Tr. 297. At this stage of the proceedings it is clear to all parties that water service is needed at the development site.

In conclusion, Carroll County's contention that water service is not needed because no one has applied for water service is moot, as it is readily apparent that both Love's and Whitehorse seek water service. Carroll County's inability to provide adequate water service for at least one year requires that Gallatin County be permitted to serve the development site.

**4. Gallatin County Must be Permitted to Service the Development Site Because Carroll County's Territory Does Not Grant It an Exclusive Right to Serve the Territory.**

A water district's delineated territory is not a grant of an exclusive right to service that territory. *Cold Spring v. Campbell County Water Dist.*, 334 S.W.2d 269, 1960 Ky. LEXIS 223 (Ky. 1960); overruled on other grounds, *Georgetown*, 516 S.W.2d 842. Stated more precisely, existing water utilities do not have the right to be free from competition. *See Kentucky Utilities Co.*, 390 S.W.2d at 175 (Ky. 1965). Furthermore, no Kentucky statute conveys water utilities the



exclusive right to serve their territories. In contrast, KRS 278.016 directly addresses retail electric suppliers and states,

the state be divided into geographical areas, establishing the areas within which each retail electric supplier is to provide the retail electric service as provided in KRS 278.016 to 278.020 and, except as otherwise provided, no retail electric supplier shall furnish retail electric service in the certified territory of another retail electric supplier.

The obvious and deliberate absence of any statute regarding exclusive service territories for water utilities was the specific intent of the legislature. As such, it cannot be ignored.

Carroll County's assertion that Carroll County has the exclusive right to provide water service within its territory is erroneous. In fact, *Cold Spring* specifically states that a water district's delineated territory is not a grant of an exclusive right to service that territory. In accordance, Gallatin County must be permitted to serve the development site.

**5. Carroll County is Barred by the Doctrine of Equitable Estoppel from Being the Exclusive Provider of Water Services to the Development Site.**

**A. Carroll County's Prior representations to Gallatin County Estop Them From Asserting that they have the Exclusive Right to Serve the Water Needs of the Development Site.**

Carroll County should be estopped from asserting that they have the exclusive right to service the development site, because Gallatin County would not have constructed the infrastructure necessary to serve the development site but for Carroll County's representations. Carroll County's knowledge, approval, and acceptance of Gallatin County's history of providing water service to the unprofitable and sparsely populated areas within Carroll County's territory serve as the legal basis to estop Carroll County from now objecting to the existing water lines.

Kentucky recognizes the doctrine of equitable estoppel. *See, Weiland v. Board of Trustees of Kentucky Retirement Systems*, Ky., 25 S.W.3d 88 (2000). For the doctrine to apply, the party sought to be estopped must have (1) engaged in conduct amounting to a false representation or concealment of material facts, or at least, which is calculated to create the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) acted with the intention, or at least the expectation, that such conduct shall be acted upon by, or influence the other party; and (3) actual or constructive knowledge of the actual facts. The person claiming the estoppel must (1) have a lack of knowledge and/ or the means of knowledge of the truth as to the facts in question; (2) good faith reliance upon the representations of the person to be estopped; and (3) action or inaction based thereon that amounts to a change in position or status to the person's detriment, injury, or prejudice. *Id.* at 91 (quoting *Electric and Water Plant Board of City of Frankfort v. Suburban Acres Development, Inc.*, Ky., 513 S.W.2d 489, 491 (1974)).

Carroll County knowingly permitted Gallatin County to serve the outlying and unprofitable regions of its territory for over ten years. Gallatin County did so in reliance on Carroll County's implied consent, only to be entrapped by Carroll County's attempt at legal redress when such territories became profitable to serve.

All of the elements required for equitable estoppel to apply are present in this case. Carroll County made numerous, material representations through its actions to Gallatin County that it knew or should have known Gallatin County would rely on. More specifically, Carroll County knowingly permitted Gallatin County to construct water lines within Carroll County's territory. In fact, Carroll County agreed to alter the existing territorial lines to accommodate a line that Gallatin County had laid within Carroll County's boundaries. Since 1995, Gallatin

County has constructed at least four water lines in the outlying and unprofitable regions of Carroll County's water district territory. The first water line was laid in 1995 along Highway 35. Tr. 88. This line was laid in order to serve customers on Old Gould Road and 271 that were not receiving water service from either county. Tr. 184. Following the completion of this line, Gallatin County constructed a second water line to serve the Park Ridge Road area. Id. This line was laid in approximately 1997 and extended down Highway 465 into the Lick Creek area. Tr. 90. A third line was laid within Carroll County's territory in 2002. Tr. 91. Finally, in 2005, a fourth and final line was laid along Highway 465 within Carroll County's territory. Tr. 92. However, no complaint of any type was made until November of 2006. Tr. 183. Thus, for over ten-years Carroll County permitted and accepted water lines constructed by Gallatin County within their territory.

The audaciousness of Carroll County's representations is illustrated by their extensive knowledge of such water lines. In fact, in one instance the construction company that constructed the water line was owned by the Superintendent of the Carroll County Water District. Tr. 187. Thus, not only did Carroll County know, but their own Superintendent profited from such water lines. Id. In such case, it is hard to imagine a more compelling authorization could exist. In a second instance, Morris Courtney, Manager of Gallatin County Water District, met with the Manager of Carroll County's Water District regarding the water line that was laid parallel to Highway 465. Tr. 187. During such meeting the parties discussed the possibility of Carroll County connecting their water line to Gallatin County's line along 465 in order to provide backup water protection for Carroll County. Tr. 190. Once again, Carroll County knew about a Gallatin County water line laid within their territory and attempted to gain a benefit from it. A third case of Carroll County authorizing Gallatin County to construct water

lines within their territory occurred when Mr. Smith, Manager of Carroll County Water District, gave his approval to construct the water line that was laid by Gallatin County in 2002. Tr. 190. In analyzing the impact of Carroll County's knowledge it is critical to recall the Kentucky Supreme Court's language in *Hunts Branch Coal Co. v. Canada, Ky.*, 599 S.W.2d 154, 155 (1980), "***One who knows or should know of a situation or a material fact is precluded from denying it or asserting the contrary where by his words or conduct he has misled or prejudiced another person or induced him to change his position to his detriment.***"

For its part, Gallatin County fulfilled all the required elements for a litigant to successfully estop an opponent. It had no knowledge of any objection by Carroll County, as no objections had been made. Furthermore, Gallatin County relied on Carroll County's actions indicating approval of its servicing of the unprofitable regions of its territory. In addition, all lines laid within Carroll County's territory were inspected by the Commission without notice of a problem ever being expressed. Tr. 183. Gallatin County acted in good faith and was attempting to serve rural areas that were financially unprofitable for Carroll County. Gallatin County's good faith is exhibited by the fact that they never took an existing customer of Carroll County. Tr. 182.

To believe it is a coincidence that Carroll County initiated its first complaint at the precise time an intruding water line became profitable would be an injustice to Gallatin County's good faith actions. Gallatin County provided water service to unprofitable locations within Carroll County's territory for over ten years. Such lines were constructed with Carroll County's full knowledge and acceptance. As a result, equity demands that Carroll County be estopped from asserting that it has the exclusive right to serve the development site.

**B. Whitehorse Development, or its successors, is Entitled to Receive Water Service at the Development Site From Gallatin County Because they Relied to Their Detriment on Representations Provided by Gallatin County and Carroll County.**

Assurances from Gallatin County and Carroll County estop said counties from failing to provide water services. As a result, Gallatin County must provide water services because they are the only county capable of currently supplying adequate water service. Kentucky recognizes the doctrine of equitable estoppel. *See, Weiland v. Board of Trustees of Kentucky Retirement Systems*, Ky., 25 S.W.3d 88 (2000). For the doctrine to apply, the party sought to be estopped must have (1) engaged in conduct amounting to a false representation or concealment of material facts, or at least, which is calculated to create the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) acted with the intention, or at least the expectation, that such conduct shall be acted upon by, or influence the other party; and (3) actual or constructive knowledge of the actual facts. The person claiming the estoppel must (1) have a lack of knowledge and/ or the means of knowledge of the truth as to the facts in question; (2) good faith reliance upon the representations of the person to be estopped; and (3) action or inaction based thereon that amounts to a change in position or status to the person's detriment, injury, or prejudice. *Id.* at 91 (quoting *Electric and Water Plant Board of City of Frankfort v. Suburban Acres Development, Inc.*, Ky., 513 S.W.2d 489, 491 (1974).

In *Suburban*, the court ruled that assurances from a water service provider estopped that provider from later rescinding its offer to provide water services. *Electric & Water Plant Board*, 513 S.W.2d 489, 491 (Ky. 1974). In *Suburban*, Suburban acquired a parcel of land outside Frankfort for the purpose of constructing an apartment complex. *Id.* at 490. An officer of Suburban contacted the manager of the Electric & Water Plant Board requesting a commitment letter to provide service. *Id.* The commitment letter was needed so that Suburban could

negotiate loans to finance construction of the apartment complex. Id. In response, a commitment letter was sent stating that an adequate supply of water and electricity could readily be made available to the plot of land. Id. Suburban then used the letter to secure financing and commenced construction. Id. Soon thereafter, Suburban requested water service. Id. However, the Electric and Water Plant Board voted to delay water service to Suburban until it could be ascertained who was to serve the area with electricity. Id. Suburban filed suit and requested injunctive relief. Id. The Franklin Circuit Court issued an injunction requiring the Electric and Water Plant Board to provide water services to Suburban. Id. In reviewing the trial courts decision the Court of Appeals ruled that the situation presented a state of facts which constituted estoppel. Id. at 491.

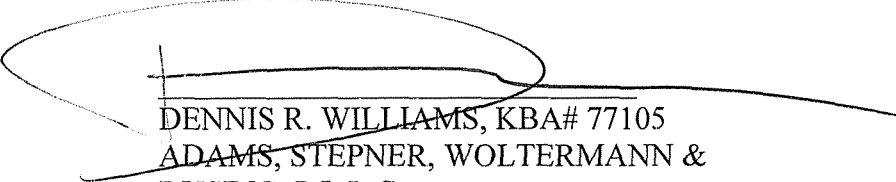
Gallatin County and Carroll County's assurances that water service would be timely provided estop them from failing to provide water services. Furthermore, because it has been established that Carroll County cannot provide adequate water service for at least one year, and then only at great increase in costs, Gallatin County should be permitted to provide water service. Just as in *Suburban*, Whitehorse was assured by both Gallatin County and Carroll County that adequate water service would be provided to the development site. Tr. 279-281. In fact, both parties echoed each others' statements, stating that the parties would work to resolve the issue and that water service would not be problem. Id. More specifically, Denny French, Chairman of Gallatin County Water District, stated that Gallatin County had an eight (8) inch line that would more than adequately serve the needs of the development. Tr. 278. Thereafter, Mr. French informed Mr. Chaney that Carroll County had an issue with Gallatin County intruding into their territory. Id. In response to Mr. Chaney's concerns regarding what effects this would have, Mr. French stated, "Nothing. We're just going to have to work through some

issues. We're going to get it resolved. Don't worry." Tr. 278-279. Despite Mr. French's assurances that there was nothing to worry about, Mr. Chaney contacted Jim Smith, Manager of Carroll County's Water District, in order to address his concerns. Tr. 279. In response, Mr. Smith stated, "***Morris is a reasonable man. We're going to work this out. It's not going to affect you one bit.***" Id. In reliance on such statements Whitehorse proceeded to develop the site. Id. Unfortunately, just as in *Suburban*, no water service was provided to the development site. As a result, the present case presents strikingly similar facts to *Suburban* and must be resolved as *Suburban* was. One factor that distinguishes this case from *Suburban* is that there is a dispute as to which party is entitled to provide water service to the development site. However, this issue is largely moot, as Gallatin County is the only party capable of providing the timely water service that was guaranteed to Whitehorse.

#### IV. CONCLUSION

For the foregoing reasons, the Intervening Complainant, Whitehorse Development Group, LLC, respectfully requests that this Commission dismiss Carroll County's Complaint, or in the alternative, issue an Order permitting Gallatin County to serve the development site.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was faxed and mailed via regular U.S. Mail, postage pre-paid, this 19~~th~~ day of December, 2007 to:

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