

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION  
CASE NO. 2009-00190

RECEIVED  
JUN 17 2009  
PUBLIC SERVICE  
COMMISSION

ROY G. COOKSEY, M.D.

PLAINTIFF

V.

BOWLING GREEN MUNICIPAL UTILITIES BOARD  
AND WARREN COUNTY WATER DISTRICT

DEFENDANTS

**PLAINTIFF'S RESPONSE TO DEFENDANT,  
BOWLING GREEN MUNICIPAL UTILITIES BOARD'S,  
MOTION TO DISMISS**

Comes the Plaintiff, Roy G. Cooksey, M.D. ("Cooksey"), by counsel, and for his response to the Defendant, Bowling Green Municipal Utilities Board's ("BGMU"), Motion to Dismiss, states that same should be denied as the PSC clearly does have jurisdiction over this matter pursuant to KRS 278.040(2), KRS 278.200 and other applicable Kentucky law. In support of Cooksey's position, he states as follows:

**STATEMENT OF THE FACTS**

Dr. Roy Cooksey ("Plaintiff") owns a farm of approximately 101 acres (the "Farm"), and has owned the Farm since 1975. The Farm is located on Lovers Lane in Bowling Green, Kentucky. The Farm is outside of the corporate city limits of Bowling Green.

For many years Plaintiff received all his water service on the Farm from the Warren County Water District ("WCWD"). Even to this day, Plaintiff gets water only from WCWD. The same can be said for sewer service as well. WCWD has been, in the past, the sole provider of sewer service to Plaintiff. A 12-inch WCWD sewer line, as well as a manhole, is

currently located on the Farm. There is currently no water or sewer service to the Farm; and, in fact, the nearest BGMU sewer line is more than 1,700 feet from the Farm.

Plaintiff's terms of service were changed abruptly in 2006. On August 14, 2006 the BGMU board of directors adopted a resolution modifying the boundaries for sewer provision between BGMU and WCWD. On August 29, 2006, the WCWD board of directors adopted a reciprocal resolution, agreeing with BGMU as to the new boundaries for sewer service between the two companies. As per this agreement, both companies would only provide sewer service within their new respective jurisdictions.

The following year, both companies adopted further resolutions agreeing on changes in the water service boundaries. On July 9, 2007, the BGMU board adopted a resolution changing the water service boundaries. Again, WCWD adopted a similar provision on June 26, 2007. Both companies agreed on only providing water to their new respective jurisdictions. These actions constitute a contract between BGMU and WCWD which affects both rates and services provided to the Plaintiff.

The effect of these agreements was that Plaintiff's Farm was split into two pieces by the new boundaries. The back 70 acres of Plaintiff's property is now in BGMU's district even though BGMU has never provided service to this property--nor is BGMU in the better position to do so. When Plaintiff was aware that he would have to go to BGMU for water and sewer service and the cost of obtaining both sewer and water service from BGMU was going to exceed \$500,000 while WCWD's water and sewer lines are currently located on his Farm, Plaintiff filed this complaint.

## ARGUMENT AND AUTHORITIES

### I. The Agreement between BGMU and WCWD Waives BGMU's Exemption to PSC Jurisdiction.

The resolutions adopted by BGMU and WCWD constitute agreements between the two utilities on who, and how, sewer and water services are to be provided to certain areas. The agreement changes who provides the services to Plaintiff and, therefore, also changes the rates charged to Plaintiff. As a result of BGMU entering into these contractual arrangements with WCWD (a PSC regulated utility) which affect both rates and services, BGMU has waived its exemption to Public Service Commission ("PSC") jurisdiction. Therefore, the PSC has jurisdiction to hear this claim.

The PSC is a statutorily created entity under the provisions of KRS Chapter 278 and as such is limited to the powers and jurisdiction granted it by statute. See *Boone County Water v. Public Service Com'n*, Ky., 949 S.W.2d 588, 590 (1997). KRS 278.040(2) specifically grants the PSC with exclusive jurisdiction over rates and services of utilities. It provides:

The jurisdiction of the commission shall extend to all utilities in this state. The commission shall have exclusive jurisdiction over the regulation of rates and service of utilities, but with that exception nothing in this chapter is intended to limit or restrict the police jurisdiction, contract rights or powers of cities or political subdivisions. (Emphasis supplied).

BGMU argues that KRS 278.010(3) exempts it as a city-operated water and sewage provider from the definition of a utility. That exemption was waived, however, when BGMU entered into a contract with WCWD which specifically relates to the respective services which would be provided by each. As a result of this action on behalf of BGMU and WCWD, BGMU is clearly subject to the jurisdiction of the PSC as it relates to this matter.

The Legislature provided a means by which a PSC may govern certain actions by a city operated utility. KRS 278.200 provides that when a city contracts with a PSC regulated utility regarding rates or the provision of service, the city loses its exemption to the extent of what is in the agreement. More specifically, KRS 278.200 states:

The commission may, under the provisions of this chapter, originate, establish, change, promulgate and enforce any rate or service standard of any utility that has been or may be fixed by any contract, franchise or agreement between the utility and any city, and all rights, privileges and obligations arising out of any such contract, franchise or agreement, regulating any such rate or service standard, shall be subject to the jurisdiction and supervision of the commission, but no such rate or service standard shall be changed, nor any contract, franchise or agreement affecting it abrogated or changed, until a hearing has been had before the commission in the manner prescribed in this chapter. (Emphasis supplied).

Since the City is not a utility, if KRS 278.040(2) stopped at the end of its first sentence, its impact would be obvious. However, the following sentence of KRS 278.040(2) must also be noted. “The commission shall have exclusive jurisdiction over the regulation of rates and service of utilities, but with that exception nothing in this chapter is intended to limit or restrict the police jurisdiction, contract rights or powers of cities or political subdivisions.” (Emphasis supplied). KRS 278.200 specifically is designed to address those instances where a contract has been made between a utility and a city. It provides that where a city and a utility enter into a contract, the terms of which include provisions for rates and services, then by so contracting the city gives up its exemption for PSC regulation and renders itself subject to regulation by the PSC. Clearly, KRS 278.200, read together with KRS 278.040(2), creates what has been called a “rates and services” exception to a city’s exemption from PSC regulation.

The Kentucky Supreme Court interpreted this statute in the case of *Simpson County Water Dist. v. Franklin*, Ky., 872 S.W.2d 460 (1994). In that case, the Court held that

when a municipal utility contracts over rates or services with a PSC regulated utility, that the municipal utility waives its exemption from PSC jurisdiction. *Simpson County Water Dist. v. Franklin* at 462. In that case, the City of Franklin had contracted with the Simpson County Water District to provide water to the county. The Court held that the PSC had jurisdiction over the rates being charged to the county because the city had waived its exemption by entering into the agreement. *Id.* at 463.

While the *Simpson County Water Dist.* case dealt with a rate contract between the two utility companies, it did not limit its holding to only those types of agreements. *Id.* at 462. Nothing in the case specifically limits the court's holding to situations of contracts for service between municipal utilities and PSC regulated utilities, as BGMU argues. The Court merely states that the primary issue in that case was whether, "...a city waives its exemption from PSC regulation by contracting to supply a commodity to a PSC-regulated utility." *Id.* at 462. The Court clearly states the rule that, "The statute has but one meaning-the City waives its exemption when it contracts with a regulated utility upon the subjects of rates and service."

"In summary, the PSC does not have jurisdiction over utility services furnished by a municipality *except to the extent that those services are rendered pursuant to a contract with a utility which is regulated by the PSC.*" *City of Greenup v. Public Service Com'n*, Ky.App., 182 S.W.3d 535, 538 (2005). (Emphasis supplied). BGMU is clearly subject to the jurisdiction of the PSC under this rule. BGMU entered into an agreement with WCWD. The two utilities agreed on how to divide up the customers by redefining their service boundaries. The two companies changed who they provided service to, and in that respect changed the rates that some individuals were going to have to pay. The agreement goes to the very nature of, as well as the extent of, the services provided by the utilities.

Defendant BGMU tries to argue that this agreement was not about a “service”. However, clearly, changing the boundaries of service alters the service itself. Just as in the *Simpson County Water Dist.* case, BGMU and WCWD’s adoption of an agreement directly related to the rates charged to customers, as well as the type of service they would be privy to. The Court held in that case, “The City's unilateral adoption of the two water-rate ordinances doubled the water charge and, in no uncertain terms, was an act that directly related to the rate charged by the water district.” Also, just as in *Simpson County Water Dist.*, the agreement between BGMU and WCWD related to the service provided by WCWD as, in that case, it was held that “The City's declaration to hold the parties' contracts null and void constitutes a practice relating to the service of the water district.”

Not to mention that the agreement clearly affects the “quantity” of the water provided. “Our interpretation of that language is, that the legislature only intended for the word “service” to apply to and comprehend “quality” and “quantity” of the product to be served...” *Benzinger v. Union Light, Heat & Power Co.*, 170 S.W.2d 38, 41 (Ky.App. 1943). Changing the respective jurisdictions of the two utilities clearly would affect the quantity of the water they would provide. WCWD might provide less water to customers now, it might provide more. In fact, it is providing less water now to at least one customer, the Plaintiff.

Cooksey is no longer able to provide water to the back 70 acres of the Farm at the rate he previously paid or, for that matter, any commercially reasonable rate. He is no longer able to run a water line from the front portion of his Farm to the rear. He is unable to provide sewer service to the barn located on the rear of the Farm without running a BGMU sewer line a distance in excess of 1,700 feet at a cost in excess of \$500,000 across property where no easement presently exists. This, while at the same time, a WCWD sewer line is located on the

Farm. The agreement entered into between BGMU and WCWD clearly affects both the rates and services provided to Cooksey.

Since the agreement between BGMU and WCWD is a clearly dealing with the services offered to customers, BGMU has waived its exemption and the PSC has jurisdiction over it.

**II. Plaintiff's Claim is not about the Territorial Lines, but about the Discrimination Caused by the BGMU and WCWD Agreement.**

BGMU argues in its motion to dismiss that Plaintiff's claim is only over the territorial boundaries of BGMU and WCWD; and that in *Simpson County Water Dist.* the court specifically distinguished cases of that nature. Motion to Dismiss, ¶ 7. BGMU is correct in that the rates and services exception does not apply to cases where, "The parties were engaged in a dispute of territorial jurisdiction, between a private utility and a city utility..." *Simpson County Water Dist. v. Franklin* at 464. However, the current case is not one of that nature. The dispute here is between a *customer* of a utility about the agreement for new territorial jurisdiction between two utilities which affects both rates and services.

In *City of Georgetown v. Public Service Commission*, Ky., 516 S.W.2d 842, 844 (1974), the dispute involved was between a municipal utility operated by the City of Georgetown, and the Kentucky American Water Company. The Kentucky American Water Company was complaining about Georgetown extending its lines into American Water's jurisdiction. In *City of Hawesville v. East Daviess County Water Ass'n, Inc.*, 2004 WL 2039467 (Ky. P.S.C 2004), another case cited by BGMU in its motion, the dispute was between the City of Hawesville and the East Daviess County Water Association. The City of Hawesville was complaining about the East Daviess County Water Association moving into its jurisdiction.

Neither of these cases involved a customer of either utility complaining about their service or the rates they have to pay.

Clearly, the facts in those cases are distinguished from the facts in this case. The issue before the PSC here is not about a municipal utility and a regulated utility arguing over territory. In fact, BGMU and WCWD have agreed on their respective territories. The current dispute is between two utilities and a *customer*. Plaintiff's action pending before the PSC specifically concerns the change in services which he is entitled to receive from the respective utilities because of their contractual arrangement as well as the rates he will have to pay. For this reason, *City of Georgetown v. Public Service Commission*, and *Hawesville v. East Daviess County Water Ass'n, Inc.* are not analogous and the PSC has jurisdiction over the complaint.

### III The PSC was Designed Specifically for Cases of this Nature.

This is a case that the PSC was designed for. "The manifest purpose of the Public Service Commission is to require and insure fair and uniform rates, prevent unjust discrimination, and prevent ruinous competition." *Simpson County Water Dist. v. Franklin* at 464; citing *City of Olive Hill v. Public Service Commission*, 305 Ky. 249, 203 S.W.2d 68 (1947). The Legislature gave the PSC exclusive jurisdiction over issues concerning rates and services rendered by regulated utilities. KRS 278.040 (2). Why would the Legislature grant the PSC the ability to hear these cases unless it was to protect customers?

In this case some customers were going to be subject to the same conditions and rates; others were going to have to change companies. This may have been a good change for some, but for others it may have been a horrible change. In Plaintiff's case the change was of the latter type. It subjected him to much higher service rates for a piece of property he has owned



for over 25 years. No one else on his street is subjected to the same treatment. This is clearly the type of discrimination the PSC was designed to protect against.

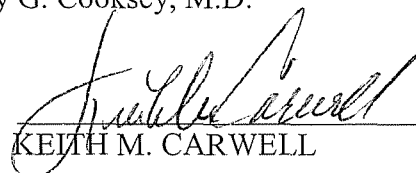
**CONCLUSION**

BGMU is clearly subject to the jurisdiction of the PSC in this case. BGMU voluntarily entered into an agreement with WCWD that directly affected the rates and services provided by each utility. Therefore, BGMU has waived its exemption from PSC jurisdiction. Also, this case is not about a territory dispute between a PSC regulated entity and a municipal utility. This dispute is between a customer and utility companies. Finally, the policy behind creation of the PSC was to protect from discrimination in rates and services provided. The agreement between BGMU and WCWD creates just that discrimination. Therefore, it would frustrate the purpose of the PSC if jurisdiction was not allowed in cases such as this. That is why the Legislature granted sole jurisdiction over rates and services to the PSC. For the aforementioned reasons, BGMU is subject to the regulation of the PSC to the extent that the regulation relates to the agreement between BGMU and WCWD.

**WHEREFORE**, Plaintiff, Roy G. Cooksey, M.D., requests that this Court enter an order overruling Defendant, Bowling Green Municipal Utilities, motion to dismiss, and for such other and further relief as this Court deems just and appropriate.

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**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing **PLAINTIFF'S RESPONSE TO DEFENDANT, BOWLING GREEN MUNICIPAL UTILITIES BOARD'S, MOTION TO DISMISS** was this date placed in the U. S. Mail addressed to:

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This 15 June 2009.

  
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