

June 25, 2009

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RECEIVED

JUL 07 2009

**PUBLIC SERVICE
COMMISSION**

IN RE: Cooksey v. Bowling Green Municipal Utilities Board
and Warren County Water District
Case No. 2009-00190

Dear Mr. Derouen:

On behalf of defendant, Bowling Green Municipal Utilities Board, I enclose six copies of BOWLING GREEN MUNICIPAL UTILITIES BOARD'S REPLY TO PLAINTIFF'S RESPONSE TO MOTION TO DISMISS, which I would appreciate your filing in this action.

Please call if you have any questions.

Very truly yours,

Timothy Edelen (by Eric Kleath)

Timothy L. Edelen

TLE/sml

Enclosure

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

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JUL 07 2009

PUBLIC SERVICE
COMMISSION
COMPLAINANT

IN THE MATTER OF:

ROY G. COOKSEY

v.

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

BOWLING GREEN MUNICIPAL UTILITIES BOARD and
WARREN COUNTY WATER DISTRICT

DEFENDANTS

Comes the defendant, Bowling Green Municipal Utilities Board ("BGMU"), by counsel, and for its Reply to the plaintiff's Response ("Response") to BGMU's Motion to Dismiss the Verified Complaint and Petition, states as follows:

As previously set forth in BGMU's Memorandum in Support of its Motion to Dismiss ("Memorandum"), BGMU is expressly exempted from the definition of a "utility," and is therefore generally exempt from the jurisdiction of the Public Service Commission. The exception to this exemption set forth in **Simpson County Water District v. City of Franklin**, 872 S.W.2d 460 (Ky. 1994) is not applicable in this case, as this does not involve a contract between BGMU and a PSC-regulated utility regarding rates or service. Instead, Cooksey disputes the territorial boundary lines between the service areas of a municipal entity, BGMU, and a utility, the Warren County Water District ("WCWD"), an issue which has been explicitly held not to be within the jurisdiction of the PSC. Accordingly, the PSC has no jurisdiction over this matter and Verified Petition and Complaint filed by the complainant should be dismissed.

I. **An agreement regarding territorial boundary lines between WCWD and BGMU does not waive BGMU's exemption to PSC jurisdiction.**

As previously set forth in BGMU's Memorandum, as a city-owned supplier of water and sewer services, BGMU is expressly exempted from the definition of a "utility," and is therefore generally exempt from PSC jurisdiction. *See* KRS 278.260, KRS 278.010(3). Although the court in **Simpson County Water District v. City of Franklin**, 872 S.W.2d 460, 462 (Ky. 1994) recognized that a city can waive its exemption when it contracts with a regulated utility "upon the subject of rates and service," this "rates and service" exception does not apply to complaints over territorial boundaries. In fact, the court in Simpson County explicitly recognized that the "rates and service exception had no relationship to" territorial boundary line issues. **Id.** at 464.

In attempting to characterize the boundary line issue as a "service" issue, the complainant argues that because WCWD and BGMU established the territorial boundary lines between the two of them by agreement, then this agreement waives BGMU's exemption from PSC jurisdiction. This argument is without merit. Although it has been held that the exemption from PSC jurisdiction may be waived when a municipal non-utility contracts with a PSC-regulated utility upon the subject of rates or service, an agreement as to the boundary lines of service areas is not such a contract. The provision of water and sewer services by BGMU to the customers within its agreed upon territory does not constitute "services [that] are rendered pursuant to a contract with a utility which is regulated by the PSC." **City of Greenup v. Public Service Com'n**, 182 S.W.3d 535 (Ky. App. 2005). These are simply services provided directly by BGMU to its own customers, over which the PSC has no jurisdiction. As previously set forth in BGMU's Memorandum, both Kentucky's highest court and the PSC itself have held that the PSC has no jurisdiction to resolve territory disputes that arise between municipal water utilities and PSC-regulated utilities. **City of Georgetown v. Public Service Com'n**, 516 S.W.2d 842

(Ky. 1974); **In the Matter of: City of Hawesville v. East Daviess County Water Association, Inc.**, 2004 WL 2039467 (Ky. P.S.C. 2004) (Slip Copy). If the complainant's argument were to be accepted, the result would be a holding by the PSC that, although it has no jurisdiction under Kentucky law over boundary line *disputes* between PSC-regulated utilities and non-utilities such as BGMU, it does have jurisdiction to alter territorial boundary line *agreements* between two such entities. No authority supports such an inconsistent result. If boundary line disputes are not rates or service issues under Kentucky law that would trigger PSC jurisdiction over a non-utility, then neither are boundary line agreements.

The complainant's argument that his objection to the agreement between WCWD and BGMU as to their territorial boundary lines is actually a rates and services issue is likewise without merit. One need only look to the relief requested by the complainant in order to establish that the core issue in this case is the location of the territorial boundary lines between WCWD and BGMU. In his Complaint, Cooksey seeks to have the PSC "require WCWD and BGMU to adjust their service area boundaries" so that his farm falls only within WCWD territory and not within BGMU territory. He does not request that the PSC make any order with regard to the actual rates or services offered by either WCWD or BGMU, but simply seeks to change the territorial boundary lines between the two. Accordingly, despite Cooksey's arguments to the contrary, this case involves a complaint by a customer about the territorial boundary lines between a PSC regulated entity and a non-PSC regulated entity, not an issue of rates or services arising out of a contract.

Although the complainant attempts to characterize the issue in this case as a service issue by asserting that "changing the boundaries of service alters the service itself," this argument is flawed for several reasons. The first is that, as previously set forth, disputes over the location of

a boundary line between the service area of a utility and the service area of a non-utility have previously been held by both Kentucky courts and the PSC itself not to be subject to PSC jurisdiction, indicating that boundary changes do not raise the type of “service” issues that would waive a non-utility’s exemption from PSC jurisdiction. *See, e.g., City of Georgetown v. Public Service Com’n*, 516 S.W.2d 842 (Ky. 1974); **In the Matter of: City of Hawesville v. East Daviess County Water Association, Inc.**, 2004 WL 2039467 (Ky. P.S.C. 2004) (Slip Copy). The second reason is that no actual “changing” of the service area boundaries has occurred.

In attempting to characterize the issue in this case as a “service” issue, as opposed to a boundary line issue, Cooksey makes multiple erroneous assertions of fact. One such assertion is that reciprocal resolutions by BGMU and WCWD adopted in 2006 created “new” sewer service boundaries, and that further resolutions in 2007 created “new” water service boundaries. Cooksey claims that these “new” boundaries caused his farm to no longer be completely served by WCWD, and to instead be partially served by BGMU. *See Response*, p. 2.

In reality, the boundary line for water service had been established in the 1970s. That water boundary line is 1,000 feet off Lovers Lane. The front portion of Cooksey’s farm therefore was supplied with water by the WCWD. The back 70 acres of Cooksey’s farm has always been considered part of BGMU’s water service area. It is contiguous with BGMU’s existing water service area. In fact, at the Lovers Lane Soccer Complex, and in particular at the maintenance building at the rear of that property (see Cooksey’s Exhibit A to his Complaint), BGMU has installed an 8 inch waterline, directly adjacent to Cooksey’s property in question. Therefore, water service is readily available by BGMU at the back 70 acre portion of Cooksey’s farm. No resolutions in either 2006 or 2007 “changed” the water service area for Cooksey’s

farm. The 2007 resolution that Cooksey refers to at page 2 of his Response was adopted merely to clean up the water service boundary map in other areas. Cooksey's farm was not affected.

The Lovers Lane area in which Cooksey's farm is situated had previously been unserved for sewer, by any utility. Cooksey therefore, as of that time, was not a customer of either BGMU or WCWD for sewer. BGMU and WCWD established a sewer boundary line by resolutions in 2006, and set that sewer boundary line along the same line as the water service boundary line at Cooksey's farm. The sewer boundary line was set between and among BGMU and WCWD after extensive engineering studies which took into consideration capacities of BGMU's sewer system and topography in the area.¹ It was determined that the back 70 acres should remain part of BGMU's service area.

Therefore, the resolutions adopted in 2006 did not have the effect of "changing" the back 70 acres of the Cooksey property from being a WCWD customer to a BGMU customer. For the back 70 acres, Cooksey had never been a WCWD sewer customer. The back 70 acres of Cooksey's farm had never been part of WCWD's sewer service area.

Accordingly, Cooksey's claim that these "agreements" or resolutions split his farm "into two pieces by the new boundaries," is false. Not only is there no merit to Cooksey's argument that the issue in this case is somehow a "service" issue and not a boundary line issue because "modifications" in the boundary lines between WCWD and BGMU affect service to his property, but this argument is not factually based. Moreover, Cooksey's argument that no water service from BGMU is available for the back portion of his farm is also false, as there is an eight inch water main located at the maintenance barn at the Lovers Lane Soccer Complex, which is adjacent to Cooksey's back 70 acres. (See Exhibit A to Cooksey Complaint). Even if the factual allegations in Cooksey's Complaint and Response were true, which is denied, the core

¹ As the PSC is fully aware, BGMU treats all sewage received from WCWD.

issue in this case would nevertheless remain a boundary line issue, and not an issue of “service,” as evidenced by the relief sought in the Complaint.

Additionally, whether a customer’s property falls within the boundaries of WCWD or BGMU does not create a “quantity” issue with regard to the water provided to that customer. Despite the fact that Cooksey may be receiving “less” water from WCWD and more water from BGMU than he would prefer, due to the location of the territorial boundary lines between the two entities, he has made no credible allegations that he is unable to receive an acceptable quantity of water overall. *Response*, p. 6. As stated, BGMU has an 8 inch waterline available to serve the back 70 acres of Cooksey’s property. The fact that an individual customer does not get to choose which of two possible entities provides his water service is not an issue of “quantity” of the water provided so as to constitutes a “service” issue, but is simply an issue of which of two entities provides the water.² Accordingly, the complainant has asserted no actual issue as to “quantity” and/or “service.” Instead, the complainant requests that the PSC issue a directive regarding the boundary between the service territory of a municipal service provider and that of a public utility, an issue over which the PSC has explicitly held that it “lacks any legal authority.” **In the Matter of: City of Hawesville v. East Daviess County Water Association, Inc.**, 2004 WL 2039467 (Ky. P.S.C. 2004) (Slip Copy).

II. The fact that a customer, not a service provider, raises a territorial boundary issue, does not create jurisdiction with the PSC.

The complainant’s argument that the allegations in his Complaint do not create a boundary line issue, but rather an issue of “discrimination,” is without merit and does not create jurisdiction with the PSC. *See Response*, p. 7. The fact that it is a customer (in this case

² It is unclear why Cooksey would request WCWD to serve water to the back 70 acre portion of his farm. WCWD buys its water from BGMU, and if WCWD were to serve Cooksey with water for the back 70 acres, Cooksey would be paying a higher rate for that water.

BGMU's customer), rather than a service provider, that takes issue with the location of the territorial boundary line between a utility and a non-utility does not change the nature of the dispute. As set forth above, if the PSC has no jurisdiction over territorial disputes between a utility and a non-utility, then the PSC likewise has no jurisdiction to alter the territorial lines between the two simply because such lines were established by agreement, and BGMU's customer now complains of it. Moreover, the complainant has cited no authority whatsoever for the proposition that the PSC could somehow acquire jurisdiction to alter the territorial boundaries between such entities simply because the party disputing the boundaries is a customer, rather than one of the entities.

III. The PSC was not "designed" to allow individual customers to choose whether to receive water and sewer service from a regulated utility or a non-regulated municipal entity.

Contrary to the plaintiff's allegations, this case does not involve "fair and uniform rates," "unjust discrimination," or "ruinous competition." *Response*, p. 8. This case involves a customer (BGMU's customer), Cooksey, who wishes to receive service on a particular part of his property from one service provider instead of the other, regardless of the established territorial boundary lines between the two providers, premised on extensive engineering and study. Following Cooksey's logic, all customers would be entitled to choose the provider of their water and sewer services, regardless of the established territorial service boundaries for the particular provider, and the reasons for establishing those boundaries. Additionally, as set forth above, no actual "change" in the water or sewer boundary lines took place in 2006 or 2007. Because Cooksey never received sewer or water service on the back portion of his farm from WCWD, his argument that the "change" in the territorial boundaries is somehow discriminatory is without merit. Accordingly, allowing individual customers to object to the territorial

boundary lines between a utility and a non-utility is certainly not the type of case that the PSC was designed for, but rather is the type of case over which the PSC has no jurisdiction.

IV. The fact that Cooksey’s farm is outside of the corporate city limits of Bowling Green is irrelevant.

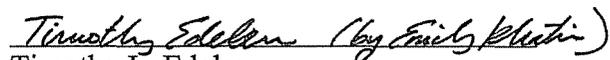
In both his Complaint and his Response, the complainant noted that his farm is outside of the corporate city limits of Bowling Green. Such fact is completely irrelevant. KRS 96.150(1) expressly authorizes a city to provide water and sanitary sewer service outside the city boundaries in areas that are contiguous to the city. According to KRS 96.150(1), any “city that owns or operates a water supply or sanitary sewer system may extend the system into, and furnish and sell water and provide sanitary sewers to any person within, any territory contiguous to the city, and may install within that territory necessary apparatus...” *See also* KRS 96.350(1) (authorizing cities to “purchase, establish, erect, maintain and operate waterworks... within or without the corporate limits of the city”) (emphasis supplied). In **City of Georgetown v. Public Service Commission**, 516 S.W.2d 842 (Ky. 1974), the court recognized a city’s authority to extend the boundaries of its water and/or sewer service areas beyond the boundaries of the city limits, and further held that the PSC has no jurisdiction over a city’s exercise of such authority pursuant to KRS 96.150(1). According to the Court, “the exemption [from PSC jurisdiction] extends to all operations of a municipally owned utility whether within or without the territorial boundaries of the city.” *Id.* at 844 (emphasis supplied). *See also Louisville Water Co. v. Public Service Commission*, 357 S.W.2d 877 (Ky. 1962) (holding that the PSC had no jurisdiction over the extension of water mains and services by the Louisville Water Company outside the corporate limits of the City of Louisville). Accordingly, the complainant’s assertion that his farm is outside the city limits does not avail the PSC of jurisdiction over the Complaint.

CONCLUSION

Contrary to the allegations in the complainant's Response, an agreement between WCWD and BGMU regarding the territorial boundary lines between the two entities is not a contract on the subject of rates and services so as to fall under PSC jurisdiction. Instead, complaints regarding the location of territorial boundary lines are simply boundary line disputes, even if the complaining party is an individual customer (in this case, BGMU's customer for the area in question). Finally, the purpose of the PSC is not to allow an individual customer to choose the entity that will provide water and sewer service to him, and to rearrange the territorial boundary lines between the two entities based upon such customer preferences. Cooksey's Complaint seeks to raise issues regarding territorial boundaries and to cause a change in such boundaries, which is an issue over which the PSC has no jurisdiction. Accordingly, the Verified Petition and Complaint filed by the complainant should be dismissed.

This 25th day of June, 2009.

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This is to certify that a true and exact copy of the foregoing has this day been mailed to:

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This 25th day of June, 2009.

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