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APR 22 2010
PUBLIC SERVICE
COMMISSION

TO: Fling @ PSC
FAX NUMBER: 502-564-3460 DATE: 4-22-2010
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Message: Case # 2009-00264
Motion to Dismiss attached; original will
be mailed today.

Thank you,
Jody Curry

Cc: Hank Gaddy @ 846-4914

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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APR 22 2010

PUBLIC SERVICE
COMMISSION

IN THE MATTER OF

JAMES S. WAYNE, INDIVIDUALLY AND AS)
TRUSTEE OF THE JAMES S. WAYNE)
LIVING TRUST)

COMPLAINANT)

VS)

HENRY COUNTY WATER DISTRICT #2)

DEFENDANT)

CASE NO. 2009-00264

MOTION TO DISMISS

Comes the Defendant, Henry County Water District #2 ("Water District"), by counsel and moves the Public Service Commission to dismiss the Complaint filed herein. In support of its Motion to Dismiss, the Water District states as follows:

Defendant incorporates herein by reference the Intra-Agency Memorandum to the Case File dated March 24, 2010 ("Memorandum".) The memorandum is the result of an informal conference conducted on March 18, 2010 and contains the facts (disputed and un-disputed) pertinent to this Motion. In sum, the Complainants are seeking the provision of water service and a "restoration of ownership" of the 3" water line in issue herein. Alternatively to their request for "restoration" of the property, the Complainants seek an award of monetary damages due to a "taking" of this water line by the Water District. Paragraph 10 of the Complaint, alleges that "the actions of the Water District constitute the taking of the private property of another, without due process, and without public necessity and without just compensation, and the wrongful denial of water supply." It is the position of the Defendant that the issues pertaining to the ownership of

private property and whether there has been a “taking” require determinations that are not within the jurisdiction of the Public Service Commission.

I. THE PUBLIC SERVICE COMMISSION DOES NOT HAVE AUTHORITY TO DETERMINE THE OWNERSHIP OF PROPERTY.

The Complainants’ claim that they own the 3” water line based on their deed of conveyance for the property purchased from Clarence Davis. The 3” water line is not physically located on the property purchased, but is located across McCarty Lane on property owned by Larry Congleton. As noted in the Memorandum, there is no recorded document granting the Complainants a right of way easement for the 3” water line, nor does their Deed of Conveyance specifically address the 3” water line. Complainants argue the water line is an “appurtenance” to the property they purchased. For purposes of this Motion, it is not necessary to argue the merits of the Complainants’ claim of ownership. This claim, grounded in real property law and requiring a construction of Complainants’ deed, is a controversy that falls within the original jurisdiction of the Henry Circuit Court. Circuit Courts have “original jurisdiction of all justiciable causes not exclusively vested in some other court.” Kentucky Constitution, Section 112; KRS 23A.010. Obviously the Public Service Commission is not a court of law, nor has it been vested by the legislature with any jurisdiction, as part of its duties, to make determinations regarding real property ownership.

On or about July 6, 2009, the Complainants filed a Complaint pursuant to KRS 278.260 seeking to “restore ownership of the McCarty Lane water line and to restore water service delivered by Henry County Water District #2 to the property of the James S. Wayne Living Trust.” Specifically in the Complainants’ prayer for relief they seek, *inter alia*, the following:

1. That the Public Service Commission determine that the James S. Wayne Living Trust is the sole owner of the Wayne water line and that the Farm be

restored to receive water from the Water District as was the case when the Farm was purchased . . .

KRS 278.260(1) grants the Public Service Commission jurisdiction over “rates and services.” The statute does not provide any authority to the Public Service Commission to grant the requested relief pertaining to restoration of property ownership, even assuming, *arguendo*, that the Complainants could prevail on their legal and factual arguments. KRS 278.260(1) states:

The commission shall have original jurisdiction over complaints as to rates or service of any utility, and upon a complaint in writing made against any utility by any person that any rate in which the complainant is directly interested is unreasonable or unjustly discriminatory, or that any regulation, measurement, practice or act affecting or relating to the service of the utility or any service in connection therewith is unreasonable, unsafe, insufficient or unjustly discriminatory, or that any service is inadequate or cannot be obtained, the commission shall proceed, with or without notice, to make such investigation as it deems necessary or convenient. The commission may also make such an investigation on its own motion. No order affecting the rates or service complained of shall be entered by the commission without a formal public hearing.

The Public Service Commission can investigate and hold hearings on the issue of whether “any regulation, measurement, practice or act affecting or relating to the service of the utility or any service in connection therewith is unreasonable, unsafe, insufficient or unjustly discriminatory, or that any service is inadequate or cannot be obtained.” *Id.* It is not disputed that water service has been restored to the Complainants farm by the Henry County Water District #2; consequently, the “complaint” as to the provision of water service from the water district to the Complainants has been satisfied and this issue is now moot.

Service is being provided to the Complainants’ property via the 3” water line that the water district obtained by a right of way easement, recorded in the office of the Henry County Clerk on September 9, 2008. The easement is a matter of public record and is not in dispute. (A copy of the recorded easement is in the Case File in Defendant’s “Response to Complainants’ First Set of

Interrogatories and Request for Production of Documents”, document at Attachment 4.) As is customary easement language, the Grantor, Larry Congleton, did covenant that he was the owner of the land on which the easement is granted. KRS 278.260 provides no grant of legislative authority to the Public Service Commission to make a determination that the Grantor (Mr. Congleton) did not have a legal right to convey this right of way easement to the water district. Pursuant to the right of way easement, the water district has obtained a property right and can go on to the Congleton property to construct and/or improve a water line in order to provide water service to the current and future residents of McCarty Lane.

II. THE PUBLIC SERVICE COMMISSION DOES NOT HAVE AUTHORITY TO DETERMINE THAT A TAKING HAS OCCURRED AND AWARD DAMAGES FOR SUCH TAKING.

Alternatively to the request for “restoration of ownership” the Complainants’ prayer for relief seeks the following:

2. That the Public Service Commission determine that the James S. Wayne Living Trust shall be justly compensated for the Wayne water line by the Water District . . .

As noted above, paragraph 10 of the Complaint alleges that “the actions of the Water District constitute the taking of the private property of another, without due process, and without public necessity and without just compensation This claim is effectively a claim for “inverse (or reverse) condemnation” and such a claim must be grounded in a constitutional due process argument, particularly Section 242 of the Kentucky Constitution. The claim requires a determination that an unconstitutional taking has occurred. Furthermore the Public Service Commission is being asked to ascertain damages for the alleged “taking.” In Big Rivers Electric Corporation v. Barnes, 147 S.W.3d 753, 756 (Ky. App. 2004), the court stated:

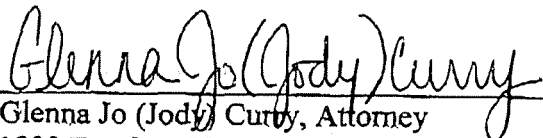
Witbeck v. Big Rivers Rural Electric Cooperative Corp., Ky., 412 S.W.2d 265 (1967), *overruled on other grounds by Commonwealth, Dept. of Highways v.*

Stephens Estate, Ky., 502 S.W.2d 71, 73 (1973), holds the exclusive remedy of the landowner is: '[t]hat where an entity possessing the power of eminent domain prematurely enters upon the premises of the condemnee, the exclusive remedy of the landowners is based on Kentucky Constitution, Section 242, which provides that "just compensation for property taken" shall be made. This remedy is frequently referred to as "reverse condemnation." The measure of damages is the same as in condemnation cases.'

Of course, for Complainants to prevail on a "taking" argument it must be determined that they own the property purportedly "taken" by the water district. As argued above, the Public Service Commission does not have the authority to make a determination of this ownership. Furthermore, it is well-settled that condemnation cases are within the exclusive jurisdiction of the Circuit Courts of this Commonwealth. KRS 416.570.

For the above-stated reasons the Complaint filed herein should be dismissed. The Public Service Commission does not have jurisdiction to rule on the Complainants' claims and grant Complainants' requested relief.

Respectfully submitted,


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COUNSEL FOR HENRY COUNTY
WATER DISTRICT NO. 2

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing **MOTION TO DISMISS** was mailed, US mail, postage prepaid to the following this 22ND day of April, 2010:

W. Henry Graddy, Attorney
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Glenna Jo (Jody) Curry
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