

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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PUBLIC SERVICE
COMMISSION

IN THE MATTER OF:

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

COMPLAINANT)

CASE NO. 2009-00264

VS.)

HENRY COUNTY WATER DISTRICT #2)

DEFENDANT)

* * * * *

RESPONSE TO MOTION TO DISMISS

* * * * *

Comes the Complainant, James S. Wayne, by and through counsel, and submits this Response to Motion to Dismiss as follows:

STATEMENT OF FACTS

Pursuant to KRS 278.260, James S. Wayne, individually and as Trustee of the James S. Wayne Living Trust, submitted a Complaint to the Kentucky Public Service Commission to restore ownership of the McCarty Lane water line *and* to restore water service delivered by Henry County Water District #2 (“Water District”) to the property of the James S. Wayne Living Trust (“Wayne”). Complaint, page 1.

Mr. Wayne purchased the 116.3-acre farm (“the Farm”) located at 1054 McCarty Lane in Campbellsburg, Kentucky on August 14, 2000. The Farm was transferred into the Wayne Trust in which Mr. Wayne and his wife, Deborah Wayne, are the Trustees.

The purchase price of the Farm included a one-mile long private water line (“Wayne water line”) across the adjacent property, with permission of that property owner, parallel to McCarty Lane, from the Water District’s main line, which runs along U.S Highway 421 to the Farm. At the time the Wayne water line was constructed, the water meter for the Wayne water line was located at the Water District’s main line at Highway 421.

In the fall of 2008, the Water District removed the water meter to the Wayne water line without the knowledge or consent of Mr. Wayne and ceased to provide water supply to the Farm. Thereafter, Mr. Wayne wrote and sent a letter to the Water District, requested a meeting with the Board of the Water District, and attended such meeting with the undersigned attorney on April 14, 2009. Mr. Wayne requested the restoration of service to the farm and restoration of ownership and control of the Water Line to the Wayne Trust. Not until November, 2009 was water service restored to the Farm as a result of negotiations after this action was filed.

Frustrated with the inaction of the Water District, Mr. Wayne was forced to file a Complaint with the Public Service Commission (PSC) on July 6, 2009, requesting that the PSC order the Water District to restore service to the Farm. Mr. Wayne also requested that the PSC determine that the Wayne Trust is the sole owner of the Wayne water line or, in the alternative, that the Water District justly compensates the Wayne Trust for the condemnation of the Wayne water line.

On March 23, 2010, both parties met for an informal conference with the PSC. That meeting produced an Intra-Agency Memorandum dated March 24, 2010, wherein several non-disputed facts were listed. The conference also produced a procedural

schedule, entered March 24, 2010, giving any party 30 days to file dispositive motions, if desired, and giving any other party 30 days to respond.

Respondent Water District filed a Motion to Dismiss (or “Motion”) claiming that the PSC lacked jurisdiction to hear this Complaint within that 30 day period. Having moved the PSC for one (1) additional day, the Complainant, Wayne, now responds. As set forth below, where the PSC was clearly granted exclusive statutory jurisdiction over water services by the Kentucky Legislature, and where pursuant to such legislative authorization, the PSC has adopted administrative regulations that govern utility “ownership of service,” the Water District’s Motion to Dismiss should be DENIED.

ARGUMENT IN RESPONSE

I. THE WATER DISTRICT MOTION TO DISMISS IS WITHOUT MERIT, WHERE, BY STATUTE THE PSC HAS JURISDICTION OVER COMPLAINTS AGAINST A REGULATED UTILITY CONCERNING OWNERSHIP OF PROPERTY.

The Water District has moved to dismiss the Complaint, arguing that, “The Public Service Commission does not have authority to determine ownership of property.” As will be discussed more fully below, the argument that the PSC does not have authority to determine what a regulated utility can acquire, own and sell, and the terms under which such property transaction will be approved, will come as a surprise to Kentucky Utilities, Louisville Gas & Electric Company, East Kentucky Power Company, and the Commonwealth Water Company, and to all other regulated utilities that have brought their requests to buy or sell property before the PSC for approval.

When considering a motion to dismiss, the pleadings should be liberally construed in a light most favorable to the plaintiff and all allegations in the complaint to be true. *Mims v. Western-Southern Agency, Inc.*, 226 S.W.3d 833 (Ky. App. 2007). A court

should not grant a motion to dismiss under any set of facts that could be proved in support of a claim. *James v. Wilson*, 95 S.W.3d 875, 883-84 (Ky. App. 2002). The question is purely a matter of law. *Id.* The Court shall only consider the contents of the complaint itself. *Ewell v. Central City*, 340 S.W.2d 479, 480 (Ky. 1960).

The Wayne Complaint asserts that the service to the Farm was unreasonably interrupted, and that the Water District has extended its service area by acquiring an existing private line without paying for the line. As such, the Complaint is about utility service and utility acquisition of property for the purpose of providing service. Where the Kentucky legislature has expressly granted the authority to regulate water rates and services to the PSC, and the PSC has adopted regulations that determine service line ownership issues, the Defendants have failed to meet the burden of dismissal. The Motion to Dismiss should be denied.

The PSC is a creature of statute and has only such powers as granted by the General Assembly. *Boone Co. Water and Sewer District v. PSC*, 949 S.W.2d 588 (Ky. 1997). Any issue involving the authority of the PSC is necessarily one of statutory analysis. *PSC v. Jackson County Rural Elec. Coop., Inc.*, 50 S.W.3d 764 (Ky. Ct. App. 2000). The Kentucky Legislature has expressly vested the PSC with authority to regulate the rates and services of the water utility including ownership issues.

There is no dispute that the Water District is a utility as defined by KRS 278.015:

Notwithstanding any of the provisions of KRS Chapter 74, any water district; combined water, gas, or sewer district; or water commission, except a joint commission created under the provisions of KRS 74.420 to 74.520, shall be a public utility and shall be subject to the jurisdiction of the Public Service Commission in the same manner and to the same extent as any other utility as defined in KRS 278.010...

KRS 278.040 gives the PSC exclusive jurisdiction over the regulation of utility rates and service and provides that the PSC shall enforce the provisions of KRS Chapter 278:

(1) The Public Service Commission shall regulate utilities and enforce the provisions of this chapter . . .

(2) 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.

(3) The commission may adopt, in keeping with KRS Chapter 13A, reasonable regulations to implement the provisions of KRS Chapter 278 and investigate the methods and practices of utilities to require them to conform to the laws of this state, and to all reasonable rules, regulations and orders of the commission not contrary to law.
(Emphasis added).

KRS 278.260(1) gives the PSC authority to hear complaints regarding the rates and services of a utility:

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.
(Emphasis added).

KRS 278.280(1) gives the PSC authority to enforce and regulate by order, rule, or regulation:

Whenever the commission, upon its own motion or upon complaint as provided in KRS 278.260, and after a hearing had upon reasonable

notice, finds that the rules, regulations, practices, equipment, appliances, facilities or service of any utility subject to its jurisdiction, or the method of manufacture, distribution, transmission, storage or supply employed by such utility, are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the commission shall determine the just, reasonable, safe, proper, adequate or sufficient rules, regulations, practices, equipment, appliances, facilities, service or methods to be observed, furnished, constructed, enforced or employed, and shall fix the same by its order, rule or regulation.

KRS 278.010(13) defines “Service” as:

[A]ny practice or requirement in any way relating to the service of any utility, including the voltage of electricity, the heat units and pressure of gas, the purity, pressure, and quantity of water, and in general the quality, quantity, and pressure of any commodity or product used or to be used for or in connection with the business of any utility, but does not include Voice over Internet Protocol (VoIP) service.

These statutes also clearly give the PSC authority to adopt regulations to implement the provision of KRS Chapter 278.¹ *Jackson County Rural Elec. Coop., Inc., supra* at 767. See also KRS 278.030(2) (“Every utility shall furnish adequate, efficient and reasonable service, and may establish reasonable rules governing the conduct of its business and the conditions under which it shall be required to render service.”) The Kentucky regulation pertaining to water rates and service regulation can be found at 807 KAR 5:066, wherein the regulation expressly regulates the issues complained of in the Complaint including: continuity of service (Section 4), service lines (Section 9), extension of service (Section 11), and service connections (Section 12). Service Connections, at Section 12, specifically pertains to the ownership of service connections:

(1) Ownership of service.

¹ Even if the PSC did not promulgate regulations pertaining to water utility services, courts have found that regulations are not a prerequisite for jurisdiction. *N. Ky. Water Dist. v. PSC*, 2009 Ky. App. Unpub. LEXIS 1034 (Ky. Ct. App. Dec. 11, 2009). (Complainant recognizes that this unpublished decision cannot be cited as binding precedent in a Kentucky Court, but may be used as persuasive authority for this unique point of law. CR 76.28(4) (c).

(a) Utility's responsibility. The utility shall furnish and install at its own expense for the purpose of connecting its distribution system to the customer's premises that portion of the service connection from its main to and including the meter and meter box. The utility may recoup this expense from the customer in accordance with KRS 278.0152.

(b) In areas where the distribution system follows well-defined streets and roads, the customer's point of service shall be located at that point on or near the street right-of-way or property line most accessible to the utility from its distribution system. In areas where the distribution system does not follow streets and roads, the point of service shall be located as near the customer's property line as practicable. Prior to installation of the meter the utility shall consult with the customer as to the most practical location.

(2) Customer's responsibility. The customer shall furnish and lay the necessary pipe to make the connection from the point of service to the place of consumption and shall keep the service line in good repair and in accordance with such reasonable requirements of the utility as may be incorporated in its rules and administrative regulations.

Where the PSC regulations require, under "Ownership of service" that a utility shall furnish and install at its own expense that portion of the service connection from its main to and including the meter and meter box, and where Wayne has complained that the Water District failed to incur the expense of constructing the disputed line, and has therefore acted in violation of that regulation, the PSC clearly has exclusive jurisdiction to determine the Water District acted in violation of that PSC regulation.

II. THE WATER DISTRICT MOTION TO DISMISS IS WITHOUT MERIT WHERE THE PSC HAS ROUTINELY BEEN REQUIRED TO MAKE "JUST COMPENSATION" DETERMINATIONS WITH REGULATED UTILITIES, AND APPROVE OR DISAPPROVE THE ACQUISITION AND SALE OF PROPERTY BY REGULATED UTILITIES.

The Water District seeks to avoid the jurisdiction of the PSC by arguing that "The Public Service Commission does not have authority to determine that a taking has

occurred and award damages for such taking.” The Water District argument misstates the issues about which Wayne complains and overlooks what is clearly within the authority and jurisdiction of the PSC.

It is common to the point of being routine that when the PSC is called upon to determine whether to approve a utility rate request, the PSC must act within the Kentucky Constitutional mandates of “just compensation.” See for example, *Commonwealth ex rel. Stephens v. S.C. B. T. Co.*, 545 S.W.2d 927 (Ky. 1976), where the PSC considered the utility argument a rate increase, and rejected the utility request. The utility appealed based upon the argument that such rejection was confiscatory, in violation of the Fourteenth Amendment of the United States Constitution and Sections 2, 13, and 242 of the Kentucky Constitution, which guarantee just compensation.

It is also routine for the PSC to consider the application by a utility to acquire property or sell property and the terms of such property exchange – precisely what Wayne complains about in this proceeding.

See *City of Catlettsburg v. Public Service Commission*, 486 S.WE.2d 62 (Ky. 1972), where the Catlettsburg, Kenova & Ceredo Water Company applied to the PSC for approval to sell the water system to the City of Ashland. The City of Catlettsburg was allowed to intervene and to object to the sale. The PSC approval of the sale was affirmed by the courts upon judicial review.

See *Public Service Commission v. Cities of Southgate, etc.*, 268 S.W.2d 19 (Ky. 1954), where certain cities objected to the PSC approval of the sale of the water utility properties from Union Light, Heat and Power Company to Commonwealth Water Company, pursuant to a contract conditioned upon PSC approval. The PSC expressly

found that it had jurisdiction to approve the sale. The cities appealed, arguing that the PSC had no jurisdiction over the sale of the utility systems. The Court of Appeals rejected that argument finding that the PSC had jurisdiction to approve the sale, and “From the commission’s order as a whole, it is apparent that the commission did give general consideration to the value of the property in relation to the price offered, at least to the extent of determining that the transaction was not unreasonable or impracticable.”

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See also, *Blue Grass State Tel. Co. v. Public Service Commission*, 382 S.W.2d 81 (Ky. 1964) where the PSC disapproved a sale of a telephone system because of the disparity between the cost basis of the system and the sale price to be paid by Blue Grass. The Court of Appeals reversed, ordering that the sale be approved.

See to similar effect, *Energy Regulatory Commission v. Kentucky Power*, 605 S.W.2d 46 (Ky. App. 1980), *South Central R. Tel. Corp. v. Public Service Commission*, 453 S.W.2d 257 (Ky. 1970).

See also the order of the PSC approving a Certificate of Public Convenience and Necessity (“CPCN”) for the acquisition of property to construct transmission lines, with detailed considerations of both cost of such facilities and location, including movement of the transmission line routes, in *The Matter of the Joint Application of Louisville Gas and Electric Company and Kentucky Utilities for the Construction of Transmission Facilities in Jefferson, Bullitt, Meade and Hardin Counties Kentucky*, PSC Case No. 2005-00467 and 2005 -00472..

Based upon the foregoing, the PSC clearly has jurisdiction to hear and decide if the method used by the Water District to extend service along McCarty Lane was fair and

reasonable or unfair and unreasonable, and to hear the issue of the value of the private water line that the Water District has taken. Based upon the above case law authority, the PSC has clear jurisdiction to determine the value of the property taken, and the amount the Water District should incur as the expense of extending its system.

III. THE WATER DISTRICT UNREASONABLY DISCONTINUED WATER SERVICE TO THE WAYNE FARM.

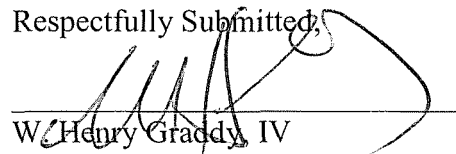
Defendant Water District claims, “It is not disputed that water service has been restored to the Complainant’s farm by the Henry County Water District #2, and “the ‘complaint’ as to the provision of water service from the water district to the Complainants has been satisfied and this issue is now moot.” Motion at 3. However, the Water District fails to argue that the service discontinuation falls under the jurisdiction of the PSC. As demonstrated above, water utility service obviously does. Furthermore, as stated in the Complaint, service to the Farm was discontinued previously without prior warning or notice. Complaint at 3. The Water District unreasonably discontinued service to the Farm in violation of KRS 278.030(2) (“Every utility shall furnish adequate, efficient and reasonable service...”). The PSC must maintain jurisdiction over this case and render a final Order to assure that such an unreasonable discontinuation of service does not happen again.

CONCLUSION

Based on the foregoing, the PSC has jurisdiction to hear the issues complained by the Complainant, where the Kentucky Legislature has expressly granted the authority to regulate water utility service, and the PSC has promulgated regulations regarding the extension and ownership of service. The Motion to Dismiss should be denied.

WHEREFORE, the Complainant, James Wayne, respectfully requests that the Defendant Water District's Motion to Dismiss be DENIED.

Respectfully Submitted,



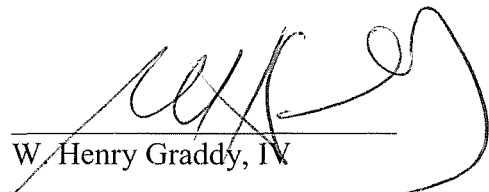
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Response to Motion to Dismiss has been served upon the following parties by mailing the same, U.S. first class postage pre-paid to the following:

Hon. Glenna Jo (Jody) Curry
900 East Mt. Zion Road
Crestwood, KY 40014

This the 25 day of May, 2010.



W. Henry Graddy, IV

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