

COMMONWEALTH OF KENTUCKY
BEFORE THE 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
V.)	
)	
HENRY COUNTY WATER DISTRICT NO. 2)	
)	
DEFENDANT)	

O R D E R

Henry County Water District No. 2 ("Henry District") has moved to dismiss the complaint filed by James S. Wayne, individually and as trustee of the James S. Wayne Living Trust, for lack of subject matter jurisdiction. The complaint alleges that Mr. Wayne is the sole owner of a 1-mile, 3-inch water line and asks the Commission to make this determination. In the alternative, the Commission is asked to order Henry District to pay Mr. Wayne monetary compensation for the water line. Additionally, the complaint requests that the Commission order Henry District to provide water service to Mr. Wayne's farm. As Henry District is currently providing water service to Mr. Wayne's farm¹, the Commission finds that this issue is moot. The Commission further finds that

¹ Letter from Jeff Derouen, Executive Director, to the parties of record, dated March 24, 2010, with an attached copy of an informal conference memorandum ("Memo"). The parties were informed that any comments regarding the contents of the Memo could be filed within five days of receipt of the letter. No comments were received.

Mr. Wayne's request for the Commission to determine that he has sole ownership of the water line or, in the alternative, that Henry District should pay Mr. Wayne compensation for this water line is outside the Commission's subject matter jurisdiction. Based on these findings, we grant Henry District's motion and dismiss the complaint.

FINDINGS OF FACT

Henry District is a water district organized pursuant to KRS Chapter 74, which owns and operates water production and distribution facilities that serve approximately 6,298 customers in Carroll, Henry, Oldham, Shelby and Trimble counties in Kentucky.² It was organized in 1965 and merged with Henry County Water District No. 1 in 1985.³ As of December 31, 2009, it had net utility plant of \$14,505,586 and total assets of \$2,163.804.⁴ It is subject to the Commission's jurisdiction.⁵

Mr. Wayne purchased a 116.3-acre farm, commonly known as 1054 McCarty Lane in Campbellsburg, Kentucky ("Wayne farm"), from Clarence Davis in August 2000.⁶ Prior to Mr. Davis's conveyance of this property to Mr. Wayne, Mr. Davis constructed a 1-mile, 3-inch water line across property owned by Larry Congleton. This

² Annual Report of Henry County Water District No. 2 to the Public Service Commission for the Year Ended December 31, 2009 at 5 and 27.

³ Id. at 4.

⁴ Id. at 7.

⁵ KRS 278.010(3) (d); KRS 278.040(2).

⁶ Complaint at 2; James S. Wayne and his wife, Deborah Wayne, purchased, along with Maria Scharfenberger, a 116.3-acre farm located at 1054 McCarty Lane in Campbellsburg, Kentucky on August 14, 2000. On August 14, 2005, James and Deborah Wayne purchased Ms. Scharfenberger's share of the farm and transferred the farm into the James S. Wayne Living Trust. James Wayne and Deborah Wayne are the trustees of the trust.

water line was initially used by Henry District to provide water service to the Davis farm and now to the Wayne farm. Although the original meter was located on the Congleton farm at U.S. 421, an additional meter has since been placed directly on the Wayne farm for its water use. Prior to Mr. Wayne's purchase of the Davis farm, there was no written documentation that mentioned the 3-inch water line on and across the Congleton farm to the Davis farm. Language in the deed of conveyance of the Davis farm to Mr. Wayne does not refer to a transfer of the 3-inch water line. There is a reference in the deed to "appurtenances thereunto."⁷

An agreement between Mr. Congleton and Henry District, dated September 3, 2008, references a conveyance of an easement of the 3-inch water line to Henry District.⁸ Henry District has maintained and made improvements to the 3-inch water line since this conveyance.⁹

On July 6, 2009, Mr. Wayne filed this complaint against Henry District alleging that, in the fall of 2008, Henry District removed the water meter located at Henry District's main line at Highway 421 without Mr. Wayne's permission and that this action resulted in the termination of water service to the Wayne farm. Mr. Wayne argues that the actions of Henry District constitute the taking of Mr. Wayne's water line, which is private property.

⁷ Letter from Jeff Derouen, Executive Director, to the parties of record, (March 24, 2010) with an attached copy of an informal conference memorandum ("Memo"). The parties were informed that any comments regarding the contents of the Memo could be filed within five days of receipt of the letter. No comments were received.

⁸ Id., Memo at 1.

⁹ Id., Memo at 2.

On September 18, 2009, Henry District filed its answer denying the following: (1) that Mr. Wayne is the sole owner of this 1-mile, 3-inch water line;¹⁰ (2) that this ownership extends from the original location of the water meter (near Highway 421) to the Wayne farm;¹¹ (3) that its actions constitute the taking of Mr. Wayne's private property without due process or just compensation; and (4) that it wrongfully denied water to Mr. Wayne.¹² Henry District further asserts that the Commission lacks jurisdiction or authority to grant the relief that Mr. Wayne is requesting.¹³

A procedural schedule was entered in this matter on October 23, 2009. Following data requests, the parties filed a joint motion requesting an informal conference, which was held on March 18, 2010. On March 24, 2010, Commission Staff filed in the record of this case a detailed memorandum of that informal conference outlining the discussion from the informal conference and stating the facts that the parties agreed to, as well as those still in dispute. The Commission's subject matter jurisdiction over the remaining issue(s) is listed as a preliminary matter. Neither party filed comments or objections to the memo.

On April 22, 2010, Henry District filed a motion to dismiss the complaint based on the Commission's lack of subject matter jurisdiction. Mr. Wayne responded on May 26, 2010, and Henry District replied on June 7, 2010.

¹⁰ Answer at 1, paragraph 4 (September 18, 2009).

¹¹ Complaint at 2-3 (6).

¹² Id. at 4(10)(J).

¹³ Answer at 2 (7); reference Answer at 4.

DISCUSSION

In its motion to dismiss, Henry District asserts that the Commission has not been vested by the Legislature with any jurisdiction to make determinations regarding the ownership of real property,¹⁴ including allegations that there has been a “taking,”¹⁵ and that jurisdiction over this case rests with the Henry County Circuit Court.¹⁶ While acknowledging that the Commission has only such powers as granted by the General Assembly, Mr. Wayne argues that property ownership issues like the one in this case fall within that established power.

Water districts are public utilities and are “subject to the jurisdiction of the Public Service Commission in the same manner and to the same extent as any other utility.”¹⁷ The Commission has “exclusive jurisdiction over the regulation of rates and service of utilities.”¹⁸ It further has primary and exclusive jurisdiction over complaints as to rates or service of any utility.”¹⁹

Before the merits of this complaint can be considered, the Commission must first determine whether it has jurisdiction in this matter. The Commission is “a creature of statute and has only such powers as have been granted to it by the General

¹⁴ Id. at 2(l).

¹⁵ Henry County Water District’s Motion to Dismiss at 1 (April 23, 2010).

¹⁶ Circuit courts have “original jurisdiction of all justiciable causes not exclusively vested in some other court.” Kentucky Constitution, Section 112; KRS 23A.010.

¹⁷ KRS 278.015.

¹⁸ KRS 278.040(2).

¹⁹ KRS 278.260(1).

Assembly.”²⁰ KRS 278.040(1) provides that the Commission has the authority to regulate public utilities and to enforce the provisions of KRS Chapter 278. This exclusive jurisdiction to regulate public utilities, however, extends only to rates and service.²¹

Although Mr. Wayne attempts to characterize this matter as a “service” issue, the court in *Simpson County Water District v. City of Franklin*, 872 S.W.2d 460 (Ky. 1994) states that “the service regulation over which the Commission was given jurisdiction refers clearly to the quantity and quality of the commodity furnished.” KRS 278.010(13) defines “service” as follows:

“Service” includes any 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

The court in *Benzinger v. Union Light, Heat & Power*, 170 S.W.2d 38, 41 (Ky.1943) opined that “the legislature only intended for the word ‘service’ to apply to and comprehend ‘quality’ and ‘quantity’ of the product to be served” In this case, Mr. Wayne’s complaint does not refer to the quantity or quality of water or any other commodity provided.

²⁰ *Boone County Water and Sewer District v. Public Service Commission*, 949 S.W.2d 588, 591 (Ky. 1997); see also *Public Service Com’n of Ky. v. Attorney General of Com.*, 860 S.W.2d 296, 298 (Ky. App. 1993) (“The PSC’s powers are purely statutory”); see also *Croke v. Public Service Commission of Kentucky*, 573 S.W.2d 927, 929 (Ky. App. 1978) (“The Public Service Commission’s powers are purely statutory; like other administrative boards and agencies, it has only such powers as are conferred expressly”); *Public Service Com’n v. Blue Grass Natural Gas Co.*, 197 S.W.2d 765, 767 (Ky. 1946) (“The power of the Public Service Commission to deal with and regulate public utilities is authorized, controlled, and restricted by Chapter 278”).

²¹ KRS 278.040(2).

The only issue that appears on the face of Mr. Wayne's complaint to be related to Henry District's rates or service is that of Henry District's water service to the Wayne farm.²² As previously stated, the water service to the Wayne farm has been restored²³ and this issue is now moot and no longer before the Commission. That being said, it is Henry District's obligation to provide Mr. Wayne with adequate, efficient, and reasonable water service. In the future, should Mr. Wayne experience an issue with Henry District not providing such service, he is encouraged to contact the Commission's Division of Consumer Services for prompt assistance with his concerns, or he can file a formal complaint with the Commission pursuant to KRS 278.260(1).

The only other issue in the complaint pertains to the ownership of private property (the 3-inch water line). Mr. Wayne's complaint asks the Commission to determine that Mr. Wayne is the sole owner of the water line or to order that Henry District "justly compensate" Mr. Wayne for it. No provision of KRS Chapter 278 confers upon the Commission the authority to award damages, and the Kentucky courts have refused to extend the Commission's jurisdiction to include monetary damage claims.²⁴ Therefore, the Commission lacks the authority to adjudicate Mr. Wayne's claim for damages.

²² Complaint at 3, 4.

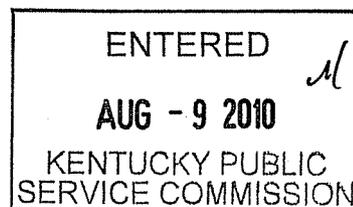
²³ Memo at 2.

²⁴ See *Gene Ray Hardy v. Louisville Gas and Electric Company*, Case No. 2006-000434; see also *Carr v. Cincinnati Bell, Inc.*, 651 S.W.2d 126 (Ky.App. 1983).

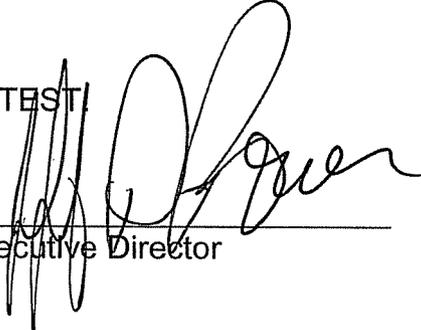
Having considered the complaint and being otherwise sufficiently advised, the Commission finds that it does not have jurisdiction to grant the relief requested by Mr. Wayne and that Henry District's motion to dismiss should be granted.

IT IS THEREFORE ORDERED that the complaint filed with the Commission on July 6, 2009 is dismissed with prejudice and removed from the Commission's docket.

By the Commission



ATTEST



Executive Director

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