

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

CARROLL COUNTY WATER DISTRICT NO. 1	)	
	)	
COMPLAINANT	)	
	)	
V.	)	CASE NO.
	)	2022-00351
	)	
GALLATIN COUNTY WATER DISTRICT	)	
	)	
DEFENDANT	)	

ORDER

This matter arises on Carroll County Water District No. 1's (Carroll District No. 1) complaint tendered on November 21, 2022, and amended complaint tendered on August 4, 2023, against Gallatin County Water District (Gallatin District) related to a water main constructed by Gallatin District near the interchange of I-71 and Highway 1039 in Gallatin County, which is in or adjacent to an area served by both Carroll District No. 1 and Gallatin District.<sup>1</sup>

On July 19, 2023, the Commission rejected Carroll District No. 1's original complaint for filing for failure to state an act or omission by Gallatin District that entitles Carroll District No. 1 to relief and for failure to establish a *prima facie* case that Gallatin District violated KRS 278.020(1) when it constructed a water main without first obtaining a Certificate of Public Convenience and Necessity (CPCN) and that Gallatin District

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<sup>1</sup> As discussed elsewhere in this Order, unlike retail electric utilities that have an exclusive right to serve their respective certified territories under KRS 278.016-.018, there is no statutory authority that grants water districts an exclusive right to provide water service in a specified area.

extended the water main to serve a single customer who was provided service under terms not available to other Gallatin District customers. In the July 19, 2023 Order, the Commission afforded Carroll District No. 1 an opportunity to amend the complaint to establish a *prima facie* case and conform to the administrative regulations pursuant to 807 KAR 5:001, Section 20.

On August 4, 2023, Carroll District No. 1 filed a response to the July 19, 2023 Order, reiterating the allegations set forth in its November 21, 2022 complaint and stating that the response “is to be considered an ‘amended Complaint’” to the extent that Carroll District No. 1 provided new statements or exhibits in the response.

#### LEGAL STANDARD

KRS 278.260 states that the Commission has jurisdiction over complaints regarding utility rates or service. Commission regulation 807 KAR 5:001, Section 20 establishes the legal standards that must be satisfied and procedures for formal complaints filed with the Commission.

Pursuant to 807 KAR 5:001, Section 20(1)(c), a complaint must state fully, clearly, and with reasonable certainty the act or omission of which a failure to comply is alleged. Under 807 KAR 5:001, Section 20(4)(a), upon the submission of a complaint, the Commission must examine the complaint to determine whether it establishes a *prima facie* case that the utility has violated a statute, regulation, tariff, or order for which the Commission may grant relief. A complaint establishes a *prima facie* case when, on its face, it states sufficient allegations that, if uncontradicted by other evidence, would entitle the complainant to the requested relief. Commission regulation Section 20(4)(a)(1) states that, if complaint does not establish a *prima facie* case or conform to the administrative

regulation, then the Commission affords the complainant an opportunity to amend the complaint within a specified time. Further, under 807 KAR 5:001, Section 20(4)(a)(2), if complaint is not amended within specified time, then the complaint is dismissed,

Relevant here, Kentucky courts have held that water districts do not have a statutory right to exercise exclusive authority to provide water service in a particular service area and that water districts.<sup>2</sup> Kentucky courts have also held that Carroll District No. 1 and Gallatin District specifically may provide coextensive service within the same service area.<sup>3</sup> Further, Kentucky courts have held that a controversy that concerns the general statutory right or authority of a water district to furnish service within a certain area is a question of law and must be determined by a court, and not by the Commission.<sup>4</sup>

Also relevant here, KRS 278.160(2) states that a utility cannot charge or receive from any person great or less compensation for any service rendered than prescribed in its filed schedules, or tariffs.

Gallatin District's Tariff Sheet Nos. 30–31 contain provisions for paying for water main extensions that mirror Commission regulations set forth in 807 KAR 5:066, Section 11. Gallatin District Tariff Sheet No. 30, 2a and 807 KAR 5:066, Section 11(2)(a) state

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<sup>2</sup> *Gallatin Co. Water Dist. v. Public Serv. Comm'n*, Franklin Circuit Ct., Div. II, Civil Action No. 08-CI-01669 (Sept. 15, 2009); *Gallatin Co. Water Dist. v. Public Serv. Comm'n*, Franklin Circuit Ct., Div. II, Civil Action No. 08-CI-01669 (Feb. 18, 2010); and *Carroll Co. Water Dist. v. Gallatin Co. Water Dist.*, No. 2009-CA-000864, 2010 WL 1628711 (Ky. App. Apr. 23, 2010). See also *City of Cold Springs v. Campbell Co. Water Dist.*, 334 S.W.2d 269 (Ky. App 1960) (overturned on other grounds).

<sup>3</sup> *Gallatin Co. Water Dist. v. Public Serv. Comm'n*, Franklin Circuit Ct., Div. II, Civil Action No. 08-CI-01669 (Sept. 15, 2009); *Gallatin Co. Water Dist. v. Public Serv. Comm'n*, Franklin Circuit Ct., Div. II, Civil Action No. 08-CI-01669 (Feb. 18, 2010); and *Carroll Co. Water Dist. v. Gallatin Co. Water Dist.*, No. 2009-CA-000864, 2010 WL 1628711 (Ky. App. Apr. 23, 2010).

<sup>4</sup> *Gallatin Co. Water Dist. v. Public Serv. Comm'n*, Franklin Circuit Ct., Div. II, Civil Action No. 08-CI-01669 (Sept. 15, 2009); *Gallatin Co. Water Dist. v. Public Serv. Comm'n*, Franklin Circuit Ct., Div. II, Civil Action No. 08-CI-01669 (Feb. 18, 2010); and *Carroll Co. Water Dist. v. Gallatin Co. Water Dist.*, No. 2009-CA-000864, 2010 WL 1628711 (Ky. App. Apr. 23, 2010).

that Gallatin District may require a prospective customer to deposit the total cost of main extension that is over 50 feet in length. Gallatin District Tariff Sheet No. 30, 2e and 807 KAR 5:066, Section 11(4) state that Gallatin District can make different arrangements for payment of the cost of main extensions over 50 feet, if the utility receives prior approval from the Commission. Finally, Gallatin District Tariff Sheet No. 30, 2f and 807 KAR 5:066, Section 11(5) state that nothing in the tariff or regulation prohibits Gallatin District from constructing extensions over 50 feet at the utility's own expense provided that like extensions are made to other customers under similar conditions.

Under KRS 278.020(1) and 807 KAR 5:001, Section 15, no utility may construct or acquire any facility to be used in providing utility service to the public until it has obtained a CPCN from the Commission by demonstrated both need for such facilities and an absence of wasteful duplication. Need requires a showing of substantial inadequacy of service.<sup>5</sup> Wasteful duplication is defined as "an excess of capacity over need" and "an excessive investment in relation to productivity or efficiency, and an unnecessary multiplicity of physical properties."<sup>6</sup> To demonstrate that a proposed facility does not result in wasteful duplication, we have held that the applicant must demonstrate that a thorough review of all reasonable alternatives has been performed. The fundamental principle of reasonable least-cost alternative is embedded in such an analysis. Selection of a proposal that ultimately costs more than an alternative does not necessarily result in wasteful duplication; all relevant factors must be balanced.<sup>7</sup>

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<sup>5</sup> *Kentucky Utilities Co. v. Pub. Serv. Comm'n*, 252 S.W.2d 885, 890 (Ky. 1952).

<sup>6</sup> *Kentucky Utilities Co. v. Pub. Serv. Comm'n*, 252 S.W.2d 885, 890 (Ky. 1952).

<sup>7</sup> *Kentucky Utilities Co. v. Pub. Serv. Comm'n*, 390 S.W.2d 168, 175 (Ky. 1965).

Under Commission precedent, the Commission will not grant a CPCN for construction that has been completed and a utility that fails to obtain prior approval of a CPCN risks a finding from the Commission barring recovery of the investment.<sup>8</sup>

Finally, KRS 278.170(1) provides that no utility may give any unreasonable preference or advantage to any person or maintain any unreasonable difference between classes of service for doing a like service under the same or substantially the same conditions.

### LEGAL BACKGROUND

As in the July 19, 2023 Order, the Commission first addresses prior legal history between Carroll District No. 1 and Gallatin District because similar issues raised by Carroll District No. 1 in this proceeding were adjudicated before the Commission and in state courts. The state court holdings remain precedent that the Commission must follow.

In brief, in a previous matter, Case No. 2007-00202,<sup>9</sup> Carroll District No. 1 requested that the Commission deny a CPCN and prohibit Gallatin District from extending its main to serve a prospective customer and find that Carroll District No. 1 had the exclusive right to serve this area.<sup>10</sup> In the final Order in that case, the Commission explained that it lacked statutory authority to establish an exclusive service territory for a water district and that water district's do not "have any right to be free of competition."<sup>11</sup>

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<sup>8</sup> Case No, 2020-00290, *Electronic Application of Bluegrass Water Utility Operating Company, LLC for an Adjustment of Rates and Approval of Construction* (Ky. PSC Aug, 2, 2021); Case No. 2003-00495, *Application of Classic Construction, Inc. for Approval of Transfer of Ownership of Collbrook Sewage Treatment Plant in Franklin County, Kentucky from Aquasource Utility, Inc.* (Ky. PSC May 10, 2004)

<sup>9</sup> Case No. 2007-00202, *Carroll County Water District No. 1 v. Gallatin County Water District* (Ky. PSC Sept. 15, 2008) (Sept. 15, 2008 Order).

<sup>10</sup> Case No. 2007-00202, Carroll District No. 1's Complaint (filed May 21, 2007).

<sup>11</sup> Case No. 2007-00202, Sept. 15, 2008 Order at 13–14.

However, the Commission further found that it had statutory authority to consider competing water utilities' claims to provide service to a prospective customer under the CPCN statute, KRS 278.020(1).<sup>12</sup> The Commission found that “[t]o the extent a water district lacks the legal authority to construct facilities outside its boundaries to serve persons outside those boundaries, it cannot demonstrate a need for such facilities or an absence of wasteful duplication.”<sup>13</sup> Finding that Gallatin District had not received Commission approval to serve the same area served by Carroll District No. 1, the Commission further found that Gallatin District could not establish need or absence of wasteful duplication under KRS 278.020(1) and thus should be denied a CPCN to construct a line to serve the area because the area was already served by another water district.<sup>14</sup>

Gallatin District appealed the Order in Case No. 2007-00202 to Franklin Circuit Court. Franklin Circuit Court vacated the Commission's Order, finding that: (1) water districts do not have exclusive service areas and more than one water district may serve the same area; and (2) the Commission acted outside its scope of statutory authority in denying Gallatin District a CPCN to serve the disputed area because the decision was predicated upon the concept that only one water utility had the legal right to serve a designated area.<sup>15</sup> Relevant to this matter, Franklin Circuit Court expressly rejected the Commission's finding that a water utility seeking a CPCN to serve an area served by

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<sup>12</sup> Case No. 2007-00202, Sept. 15, 2008 Order at 18–19.

<sup>13</sup> Case No. 2007-00202, Sept. 15, 2008 Order at 18,

<sup>14</sup> Case No. 2007-00202, Sept. 15, 2008 Order at 18–19.

<sup>15</sup> *Gallatin Co. Water Dist. v. Public Serv. Comm'n*, Franklin Circuit Ct., Div. II, Civil Action No. 08-CI-01669 (Sept. 15, 2009).

another water utility inherently could not satisfy the need or absence of wasteful duplication standards if another water utility was serving the area.<sup>16</sup>

On rehearing, Franklin Circuit Court reiterated that the Commission Order in Case No. 2007-00202 was vacated and remanded back to Commission to determine whether Gallatin District had to obtain a CPCN to serve the area in question. Franklin Circuit Court underscored that the Commission could not consider the overlapping service areas as a factor in the decision whether to grant or deny a CPCN.<sup>17</sup> The Court stated that the Commission could hold the remand in abeyance while a similar case was being appealed in the Court of Appeals.<sup>18</sup>

During the pendency of the Franklin Circuit Court matter, Carroll District No. 1 filed another action in state court against Gallatin District and the Gallatin County Judge Executive challenging, among other things, Gallatin District's ability to obtain a CPCN and serve the area in question. In that proceeding, Carroll District No. 1 argued that because the area was in Carroll District No. 1's service area, Gallatin District was precluded from serving the area.<sup>19</sup> The Court of Appeals upheld a trial court's finding that water districts do not have an exclusive service are and that Gallatin District's proposal to serve a

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<sup>16</sup> *Gallatin Co. Water Dist. v. Public Serv. Comm'n*, Franklin Circuit Ct., Div. II, Civil Action No. 08-CI-01669 (Sept. 15, 2009).

<sup>17</sup> *Gallatin Co. Water Dist. v. Public Serv. Comm'n*, Franklin Circuit Ct., Div. II, Civil Action No. 08-CI-01669 (Feb. 18, 2010).

<sup>18</sup> *Gallatin Co. Water Dist. v. Public Serv. Comm'n*, Franklin Circuit Ct., Div. II, Civil Action No. 08-CI-01669 (Feb. 18, 2010). Although the decision not to re-open Case No. 2007-00202 was not documented in the administrative record, Commission internal records of pending litigation indicated that the matter was held in abeyance. According to a May 6, 2008 filing by Carroll District No. 1 in Case No. 2006-00202, Carroll District No. 1 began providing water to the area in dispute on April 29, 2008.

<sup>19</sup> *Carroll Co. Water Dist. v. Gallatin Co. Water Dist.*, No. 2009-CA-000864, 2010 WL 1628711 (Ky. App. Apr. 23, 2010).

prospective customer in Carroll District No. 1's service area was not a wasteful duplication of service merely because the area would be served by two water districts.<sup>20</sup>

#### CARROLL DISTRICT NO. 1'S ORIGINAL COMPLAINT

In its original complaint, Carroll District No. 1 alleged that Gallatin District violated the CPCN statute KRS 278.020(1) by extending a water main into Carroll District No. 1's service area, resulting in unnecessary and wasteful facilities. Carroll District No. 1 further alleged that Gallatin District violated KRS 278.160 by failing to require a customer to pay the tariffed cost to extend service to that customer. In the July 19, 2023 Order, the Commission found that Carroll District No. 1 failed to state an act or omission by Gallatin District that violated a statute, regulation, or Commission Order and had not established a *prima facie* case that Gallatin District violated KRS 278.020(1) or KRS 278.160 because: (1) state courts, and thus controlling precedent, expressly found that a CPCN cannot be denied as failing to meet the need and absence of wasteful duplication standard merely because one water district extends facilities into an area served by another water district; (2) case law directly on point expressly states that, because water districts have coextensive rights to serve same areas, a dispute over a water district's right to furnish water service to an area served by another water district is matters for state courts rather than the Commission; and (3) Carroll District No. 1 ignored regulatory and tariff provisions that Gallatin District is not prohibited from paying cost of extension.<sup>21</sup>

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<sup>20</sup> *Carroll Co. Water Dist. v. Gallatin Co. Water Dist.*, No. 2009-CA-000864, 2010 WL 1628711 (Ky. App. Apr. 23, 2010).

<sup>21</sup> Order (Ky. PSC July 19, 2023) at 10–12.

## CARROLL DISTRICT NO. 1'S AMENDED COMPLAINT

In its amended Complaint, Carroll District No. 1 repeated its assertion that Gallatin District violated KRS 278.020(1) because it constructed facilities in an area served by Carroll District No. 1, and thus the facilities were not needed and resulted in wasteful duplication based upon the service overlap. Carroll District No. 1 also repeated its assertion that Gallatin District violated KRS 278.160 by extending service to one customer at a cost less than the prescribed schedule. Finally, Carroll District No. 1 asserted that Gallatin District violated KRS 278.170(1), which prohibits a utility from giving an unreasonable preference to any person, by extending service to a prospective customer without charging the same rate as would be charged similarly situated customers under the same conditions. In support of this assertion, Carroll District No. 1 filed a purported water use agreement between Gallatin District and a named customer, and a check purportedly signed by the named customer in the amount of \$802 that, according to Carroll District No. 1, represented the amount paid by the customer for a water main extension that, according to Carroll District No. 1, cost \$74,000 to construct.

Carroll District No. 1 maintained that, under KRS 278.260, the Commission was required to schedule a hearing on this matter.

### DISCUSSION AND FINDINGS

Based upon a review of the complaint and amended complaint, and taking administrative notice of opinions issued by Franklin Circuit Court and the Court of Appeals, the Commission finds that Carroll District No. 1 failed to state an act or omission by Gallatin District that entitles Carroll District No. 1 to relief and has not established a *prima facie* case that Gallatin District violated KRS 278.020(1), KRS 278.160, or

KRS 278.170 for the reasons discussed below. Because Carroll District No. 1 did not state an act or omission by Gallatin District that entitles Carroll District No. 1 to relief or establish a *prima facie* case in its amended complaint, the Commission also finds that this matter should be dismissed pursuant to 807 KAR 5:001, Section 20(4)(a)(2).

Regarding the alleged violation of KRS 278.020(1), the Commission notes that case law precedent forecloses Carroll District No. 1's argument that Gallatin District violated KRS 278.020(1) merely because Gallatin District is providing service in an area overlapping Carroll District No. 1's service area. To the extent that Carroll District No. 1 filed new arguments, the Commission notes that Carroll District No. 1 cited to a vacated Commission Order to support the argument that the Commission "clearly possesses the authority to consider competing utilities claims to provide service to a prospective customer to prevent wasteful duplication of facilities or excessive investment."<sup>22</sup> The Commission is not persuaded by this argument because, not only was this Order vacated by Franklin Circuit Court, the Court expressly held that the Commission could not deny a water district's request for a CPCN merely because the facilities were located in an area also served by another water district.<sup>23</sup>

Not only does case law foreclose Carroll District No. 1's argument that Gallatin District violated KRS 278.020(1), but Carroll District No. 1 also fails to state a cause of action for which it is entitled to relief. The water main extension has already been constructed. As noted above, the risk to Gallatin District is that the costs to construct the

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<sup>22</sup> Amended Complaint at 2 (*citing* PSC Case No. 2007-00202, Sept. 15, 2008 Order at 14).

<sup>23</sup> See *Gallatin Co. Water Dist. v. Public Serv. Comm'n*, Franklin Circuit Ct., Div. II, Civil Action No. 08-CI-01669 (Sept. 15, 2009). Also see KRS 278.390, which states that Commission Orders continue in force until vacated by Order of a court of competent jurisdiction, such as Franklin Circuit Court.

extension cannot be recovered in rates. Further, any remedy arising from a determination that Gallatin District willfully violated KRS Chapter 278 by constructing a facility without a CPCN would consist of the assessment of a civil penalty, which is determined in an investigation or show cause proceeding and not in a complaint case.<sup>24</sup> Thus, the amended complaint filed by Carroll District No. 1 does not state sufficient allegations that, if uncontradicted by other evidence, would entitle Carroll District No. 1 to the requested relief.

Regarding the allegation that Gallatin District violated KRS 278.160 and KRS 278.170 regarding the cost of the water main extension, Carroll District No. 1 continues to ignore regulatory and tariff provisions in 807 KAR 5:066, Section 11, and Gallatin District Tariff Sheet Nos. 2 and 30–31 that permit a utility to pay the cost of an extension such as the extension that is the subject of this complaint. Further, the Commission is not persuaded that the \$802 check and water user agreement filed as exhibits to the amended complaint establish that Gallatin District's customer received an unreasonable preference in violation of KRS 278.160 or KRS 278.170. This is because the check and legible portions of the water usage agreement are silent as to the purpose of the payment, and whether the customer or, consistent with Gallatin District Tariff Sheet 31(2)(f), whether the utility will pay for the water main extension at issue here.<sup>25</sup> As discussed further below, Carroll District No. 1 argued that it is the Commission's responsibility to obtain evidence to support Carroll District No. 1's allegations.<sup>26</sup> This is

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<sup>24</sup> See Case No. 2013-00291, *Harold Barker, Ann Barker, and Brooks Barker v. East Kentucky Power Cooperative, Inc.* (Ky. PSC July 6, 2015), Order at 20

<sup>25</sup> See Amended Complaint, Exhibit A.

<sup>26</sup> Amended Complaint at 7.

inconsistent with Commission precedent that a complaint must state sufficient allegations that, if uncontradicted by other evidence, would require the complainant to requested relief. Because Carroll District No. 1's amended complaint relies on speculation and unsupported conclusory statements, it does not state sufficient allegations that, if uncontradicted by other evidence, would entitle Carroll District No. 1 to the requested relief.

Regarding Carroll District No. 1's assertion that it is entitled to a hearing to determine whether Gallatin District violated KRS Chapter 278, the Commission notes that the complaint and amended complaint were not deemed filed because they failed to satisfy applicable requirements of 807 KAR 5:001, Section 9(a)(2) or 807 KAR 5:001, Section 20. Thus, Carroll District No. 1's assertion that a hearing must be held to determine whether Gallatin District violated KRS 278.020(1), KRS 278.160, and KRS 278.170 is premature given that Gallatin District is not a party to this matter because this matter is rejected for filing for reasons stated above. Further, Carroll District No. 1's request for a hearing is predicated upon shifting the burden of proof from Carroll District No. 1, as the complainant, to the Commission, with the Commission taking action to gather information to support Carroll District No. 1's unsupported allegations, at which point the burden of proof would then shift to Gallatin District, a non-party to this proceeding, to rebut the evidence gathered by the Commission on behalf of Gallatin District, and only then proceeding to a formal hearing.<sup>27</sup> Under this scenario, Carroll District No. 1 requested the Commission to ignore the legal process that governs Commission proceedings. Further, Carroll District No. 1 ignores the provision in

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<sup>27</sup> Amended Complaint at 7–8.

KRS 278.260(2) that, even if a complaint is deemed filed, the Commission retains by statute the discretion to dismiss a complaint without a hearing “if, in [the Commission’s] opinion, a hearing is not necessary in the public interest or for protection of substantial rights.” For these reasons, the Commission further finds that Carroll District No. 1’s request to hold a hearing to investigate Gallatin District’s alleged violations of KRS 278.020(1), KRS 278.160, and KRS 278.170 is denied.

For all these reasons, the Commission finds that Carroll District No. 1’s amended complaint should be dismissed pursuant to 807 KAR 5:001, Section 20(4)(a)(2).

IT IS THEREFORE ORDERED that:

1. The amended complaint tendered by Carroll District No. 1 is rejected for filing.
2. Carroll District No. 1’s amended complaint is dismissed.
3. This matter is closed and removed from the Commission’s docket.

PUBLIC SERVICE COMMISSION

  
Chairman

  
Vice Chairman

  
Commissioner

ENTERED  
SEP 19 2023 rcs  
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SERVICE COMMISSION

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