

COMMONWEALTH OF KENTUCKY
 BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

ORDER

On November 21, 2022, Carroll County Water District No. 1 (Carroll District No. 1) tendered a complaint against Gallatin County Water District (Gallatin District) alleging that: (1) Gallatin District violated KRS 278.020(1) by constructing a water main near the interchange of I-71 and Highway 1039 in Gallatin County without first obtaining a Certificate of Public Convenience and Necessity (CPCN) from the Commission; (2) that the main extension is an “unreasonable and wasteful expenditure of public funds”¹ and improperly interferes in Carroll District No. 1’s service area because Carroll District No. 1 serves the area is dispute; and (3) improperly interferes in Carroll District No. 1’s service area by offering “preferences” to prospective customers.²

The facility at issue is a water main extension that was completed in 2022 and located in Gallatin County in an area that is served by both Carroll District No. 1 and

¹ Complaint, paragraphs 1, 37-47.
² Complaint, paragraphs 1, 41.

Gallatin District. As discussed below, this matter has a complex, 20-year legal history that involved a previous Commission case and two state court proceedings.

Carroll District No. 1's requested relief is that the Commission prohibit Gallatin District from connecting any customer to the 361-foot water main extension completed in October 2022 and require Gallatin District to comply with its tariff regarding the extension of water mains.

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 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 filing of a complaint, the Commission must examine the complaint to determine if 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 this 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.³ Kentucky courts have also held that Carroll District No. 1 and Gallatin District specifically may provide coextensive service within the same service area.⁴ 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.⁵

Also relevant here, 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 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

³ *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).

⁴ *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).

⁵ *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).

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.

KRS 74.115 authorizes water districts to extend into an adjoining county upon order of county judge executive.

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.⁶ 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."⁷ 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.⁸ All relevant factors must be balanced.

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

⁷ *Kentucky Utilities Co. v. Pub. Serv. Comm'n*, 252 S.W.2d 885, 890 (Ky. 1952).

⁸ *Kentucky Utilities Co. v. Pub. Serv. Comm'n*, 390 S.W.2d 168, 175 (Ky. 1965).

Finally, 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.⁹

LEGAL BACKGROUND

Because similar issues were adjudicated before the Commission and in state courts, a discussion of the prior legal history is relevant. Carroll District No. 1 and Gallatin District were established as water districts in the 1960s.¹⁰ Carroll District No. 1's service area was expanded into Gallatin County in 1983 with approval of Gallatin County Fiscal Court; in 1998, a portion of Carroll District No. 1's Gallatin County service area was diminished by Gallatin County Judge Executive and Carroll County Judge Executive to allow Gallatin District to be the sole water utility serving Kentucky Speedway.¹¹ In 2008, the Gallatin County Judge Executive annexed property north and south of I-71 between the Carroll County boundary with Gallatin County to the west and south, and Highway 35 to the east, which includes the area at issue in this case.¹²

In Case No. 2007-00202,¹³ a dispute over service to a prospective commercial customer in Gallatin County, Carroll District No. 1 requested the Commission find that Carroll District No. 1 had the exclusive right to serve this area and this customer, and that

⁹ 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).

¹⁰ Case No. 2007-00202, *Carroll County Water District No. 1 v. Gallatin County Water District* (Ky. PSC Sept. 15, 2008), Order at 2–3.

¹¹ Case No. 2007-00202, Sept. 15, 2008 Order at 4 and Figure 1.

¹² Case No. 2007-00202, Sept. 15, 2008 Order, Figure 1.

¹³ Case No. 2007-00202, Carroll District No. 1's Complaint (filed May 21, 2007).

Gallatin District be prohibited from extending its main to serve that customer. The main extension was completed on September 11, 2007, by the property developer, and not Gallatin District, while the complaint was pending.¹⁴ Carroll District No. 1 subsequently obtained permission to tie a new service line into that main and began providing water service to that area in April 2008.¹⁵

In the September 15, 2008 final Order in Case No. 2007-00202, the Commission acknowledged that, except for retail electric service, it lacked statutory authority to establish an exclusive service territory and that, except for retail electric utilities, utilities do not “have any right to be free of competition.”¹⁶ However, the Commission’s denial of a CPCN for Gallatin District turned on a finding that Gallatin District was extending service into an area already served by Carroll District No. 1. The Commission found that it had statutory authority to consider competing water utilities’ claims to provide service to a prospective customer under KRS 278.020(1) and that Gallatin District could not establish need or wasteful duplication to serve an area already served by another water district. Gallatin District was prohibited from constructing any facility to provide water service within Carroll District No. 1’s territory or to serve an area in dispute without first obtaining a CPCN from the Commission

Gallatin District appealed the September 15, 2008 Order in Case No. 2007-00202 to Franklin Circuit Court. Franklin Circuit Court vacated the Commission’s Order, finding

¹⁴ *Gallatin District v. PSC*, Franklin Circuit Court, Civil Action No. 08-CI-01669, Sept. 15, 2009 Order at 4.

¹⁵ Case No. 2007-00202, Carroll District No. 1 Objection (filed May 6, 2008) at 3–4, Affidavit, and Exhibits 1–3.

¹⁶ Case No. 2007-00202, Sept. 15, 2008 Order at 13–14.

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 Gallatin District serving an area served by Carroll District No. 1.¹⁷ On rehearing, Franklin Circuit Court subsequently reiterated that the September 15, 2008 Commission Order was vacated and remanded back to Commission to determine whether Gallatin District had to obtain a CPCN before serving the area, but provided that the Commission could hold the remand in abeyance while a similar case was being appealed in the Court of Appeals.¹⁸ No party appealed the Franklin Circuit Court opinion. The Commission held the remand in abeyance pending the Court of Appeals decision, and never re-opened Case No. 2007-00202 to address whether Gallatin District had to obtain a CPCN for the main extension.¹⁹

During the pendency of the Franklin Circuit Court matter, Carroll District No. 1 filed an action in Gallatin Circuit Court against Gallatin District and the Gallatin County Judge Executive, appealing the Gallatin County Judge Executive's order annexing area in dispute. Gallatin Circuit Court found that Carroll District No. 1 did not have exclusive right to provide water service within Carroll District No. 1's service territory per statutory and case law, that Gallatin District could expand its service area into Carroll District No. 1's

¹⁷ *Gallatin Co. Water Dist. v. Public Serv. Comm'n*, Franklin Circuit Ct., Div. II, Civil Action No. 08-CI-01669 (Sept. 15, 2009).

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

¹⁹ 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.

service area, and that the annexation was supported by substantial evidence.²⁰ Carroll District No. 1 appealed the trial court's opinion to the Court of Appeals, which upheld the trial court, finding that water districts do not have an exclusive service area, that Gallatin District's proposal to serve a prospective customer in Carroll District No. 1's service area was not a wasteful duplication of service because there was no service in the area at issue, and that annexation was proper and supported by substantial evidence.²¹

As noted above, Case No. 2007-00202 was never reopened and there were no further proceedings before the Commission regarding this issue until the complaint was filed in this matter.

CARROLL DISTRICT NO. 1'S COMPLAINT

In its complaint in the instant case, Carroll District No. 1 raised issues like those adjudicated in Case No. 2007-00202 regarding Gallatin District providing service to an area served by Carroll District No. 1, alleging that Gallatin District violated KRS 278.020(1) by extending a water main into an area already served by Carroll District No. 1. Carroll District No. 1 also asserted that Gallatin District improperly interfered in Carroll District No. 1's service area by offering preferences to prospective customers.

Carroll District No. 1 stated that in May 2022, Gallatin District received approval from the Kentucky Division of Water (KDOW) to extend a water main approximately 361 feet into an area near the interchange of I-71 and Highway 1039 in Gallatin County and

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

²¹ *Carroll Co. Water Dist. v. Gallatin Co. Water Dist.*, No. 2009-CA-000864, 2010 WL 1628711 (Ky. App. Apr. 23, 2010).

that the extension was completed on October 29, 2022.²² Carroll District No. 1 asserted that the main extension crosses under Carroll District No. 1's existing main.²³ Carroll District No. 1 further asserted that the extension serves a single customer at a capital cost of \$74,000 with an annual operation and maintenance (O&M) cost estimated by Carroll District No. 1 as \$12,000.²⁴ Carroll District No. 1 maintained that Gallatin District's other ratepayers to pay higher rates to subsidize the cost to serve the single customer.²⁵

Carroll District No. 1 argued that Gallatin District's extension violated KRS 278.020(1) because Gallatin District did not obtain a CPCN prior to extending the main and that, because Carroll District No. 1 has main in the area, the extension unnecessarily duplicated service provided by Carroll District No. 1. Carroll District No. 1 further argued that Gallatin District's extension resulted in inefficient investment, claiming that Carroll District No. 1 could have extended service to the area at a lower cost than Gallatin District.

Carroll District No. 1 argued that Gallatin District provided this customer with an unreasonable preference, asserting that, under Gallatin District's tariff, the customer should have deposited \$71,950 with Gallatin District to pay for the extension or made other arrangements to pay for the extension, which required prior Commission approval.²⁶

Carroll District No. 1 maintained that there is no record that Gallatin District entered into

²² Complaint, paragraph 38.

²³ Complaint, paragraph 38.

²⁴ Complaint at 39–40.

²⁵ Complaint at 40.

²⁶ Complaint at 42.

an agreement for the cost of the extension that differed from the tariff.²⁷ The complaint does not address whether the full amount of the deposit was submitted to Gallatin District.

DISCUSSION AND FINDINGS

Based upon the record of this case and Case No. 2007-00202 and taking administrative notice of opinions issued by Franklin Circuit Court and the Court of Appeals, the Commission finds that Carroll District No. 1 has not established a *prima facie* case because the complaint fails to state an act or omission by Gallatin District that violates a statute, regulation, or Commission Order.

Regarding Carroll District No. 1's claim that Gallatin District is interfering in Carroll District No. 1's service area, the Commission notes that KRS Chapters 74 and 278 do not contain statutes that create exclusive service areas for water districts. Further, Kentucky case law directly on point expressly states that territorial disputes between two water districts is not within the Commission's jurisdiction.²⁸ Kentucky case law further holds that questions regarding disputes over a water district's right to furnish water service to an area served by another water district is a matter for state courts rather than the Commission, and that water districts have coextensive rights to serve same service areas.²⁹ Thus, Carroll District No. 1's claims regarding Gallatin District's alleged interference with Carroll District No. 1's service area should be heard in a venue other than before the Commission.

²⁷ Complaint at 42.

²⁸ *Gallatin Co. Water Dist. v. Public Serv. Comm'n*, Franklin Circuit Ct., Div. II, Civil Action No. 08-CI-01669, *12 (Sept. 15, 2009).

²⁹ *Gallatin Co. Water Dist. v. Public Serv. Comm'n*, Franklin Circuit Ct., Div. II, Civil Action No. 08-CI-01669, *12 (Sept. 15, 2009).

Regarding Carroll District No. 1's allegation that Gallatin District violated KRS 278.020(1) because it cannot establish need or that the main extension will not result in wasteful duplication because Carroll District No. 1 serves that area, this argument was expressly rejected by the Court of Appeals and Franklin Circuit Court in separate opinions that more than one water district may serve the same area, as discussed above.

Carroll District No. 1's argument that the main extension results in wasteful duplication is also based on Carroll District No. 1's speculation regarding Gallatin District's capital and O&M costs for the extension. Carroll District No. 1 provided only conclusory statements regarding Gallatin District's costs using estimated O&M costs based upon hypothetical circumstances. Carroll District No. 1 similarly offered an unsupported, conclusory statement that Carroll District No. 1 could provide the same service at a lower capital and O&M cost. However, there is no evidence that Carroll District No. 1 provide service in the disputed area and, as the Court of Appeals held, there cannot be a wasteful duplication of services if no service is provided within the subject area.³⁰

Additionally, Carroll District No. 1 does not request a remedy to which it is entitled. The main extension has already been constructed. Per Commission precedent, the risk to Gallatin District is that the costs to construct the extension cannot be recovered in rates. Any remedy arising from a determination that Gallatin District willfully violated KRS Chapter 278 by constructing a facility without a CPCN and thus should be subject to the assessment of a civil penalty is determined in an investigation/show cause

³⁰ *Carroll Co. Water Dist. v. Gallatin Co. Water Dist.*, No. 2009-CA-000864, 2010 WL 1628711 *4 (Ky. App. Apr. 23, 2010).

proceeding and not in a complaint case.³¹ Thus, Carroll District No. 1 seeks a remedy to which it is not entitled.

Finally, regarding Carroll District No. 1's allegation that Gallatin District provided an unreasonable preference in extending a water main, Carroll District No. 1 rests its assertion on speculation that Gallatin District did not require the prospective customer to pay a deposit and instead entered a different arrangement with prospective customer regarding paying for the extension without first obtaining Commission approval. However, this ignores other regulatory and tariff provisions that Gallatin District is not prohibited from paying cost of extension itself provided that Gallatin District pays for extensions for other customers under similar conditions. In Case No. 2007-00202, the administrative record reflects that Gallatin District used internal funds or funds from Gallatin County Fiscal Court to pay the capital costs of the 2002 extension and planned to use internal funds for the 2007 extension.³² Because Carroll District No. 1's allegation rests on speculation and ignores other regulatory provisions the permit the utility to pay the cost of an extension over 50 feet, the Commission finds that Carroll District No. 1 has not established a *prima facie* case.

For the reasons discussed above, the Commission finds that Carroll District No. 1 failed to set for an act or omission by Gallatin District for which Carroll District No. 1 is entitled to relief and failed to establish a *prima facie* case. In accordance with 807 KAR 5:001, Section 20(4)(a)(1), the Commission finds that Carroll District No. 1 should be

³¹ 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.

³² Case No. 2007-00202, Sept. 15, 2008 Order at 7; and Case No. 2007-00202, Gallatin Testimony (filed Oct. 22, 2007).

afforded the opportunity to amend its complaint to establish a *prima facie* case within 20 days of service of this Order. Failure to timely file an amended complaint that establishes a *prima facie* case shall result in dismissal of the complaint by separate Order of the Commission.

Because Carroll District No. 1 is represented by counsel in compliance with 807 KAR 5:001, Section 4(4), the Commission finds that Carroll District No. 1 shall file its amended complaint and any future filings using the Commission's electronic filing service and shall be served by the Commission by electronic mail in accordance with KRS 279.380 at the service addresses provided in Carroll District No. 1's complaint.

IT IS THEREFORE ORDERED that:

1. Carroll District No. 1's complaint is rejected 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.
2. Carroll District No. 1 shall file an amended complaint within 20 days of service of this Order.
3. Carroll District No. 1's failure to timely amend its complaint shall result in dismissal of the complaint by separate Order.

PUBLIC SERVICE COMMISSION



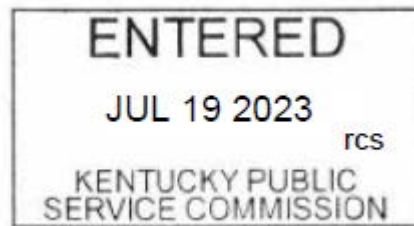
Chairman



Vice Chairman



Commissioner



ATTEST:



Executive Director

*Honorable Damon R Talley
Attorney at Law
STOLL KEENON OGDEN PLLC
300 West Vine Street
Suite 2100
Lexington, KENTUCKY 40507-1801

*Gallatin County Water District
4500 Highway 455
Sparta, KY 41086

*Carroll County Water District #1
205 Main Cross Street
P. O. Box 350
Ghent, KY 41045

*Obe Cox
Carroll County Water District #1
205 Main Cross Street
Ghent, KY 41045

*Honorable Ruth H Baxter
Attorney at Law
Crawford & Baxter, P.S.C. Attorneys at Law
523 Highland Avenue
P. O. Box 353
Carrollton, KENTUCKY 41008