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**RE: Superior Water Service
Docket No. 17-00120**

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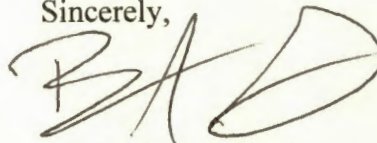
**TN PUBLIC UTILITY COMMISSION
DOCKET OFFICE**

ELECTRONIC MAIL

Dear Ms. Dillon:

Please find attached the Reply in Support of Motion to Dismiss for filing with the Tennessee Public Utility Commission in Docket Number 17-00120. The copies will be hand delivered tomorrow to your office.

Sincerely,



Benjamin A. Gastel

Enclosure

cc: Michael Dolan
Geoffrey Coston
Daniel P. Whitaker, III



BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION

IN RE:

**PETITION OF SUPERIOR WATER SERVICE)
FOR A CERTIFICATE OF CONVENIENCE)
AND NECESSITY TO PROVIDE WATER)
SERVICE TO A PORTION OF KING'S)
CHAPEL SUBDIVISION IN WILLIAMSON)
COUNTY)**

Docket No. 17-00120

REPLY IN SUPPORT OF MOTION TO DISMISS

On November 27, 2017, the Nolensville/College Grove Utility District (“NGUD”) and Milcrofton Utility District (“MUD”) (collectively “the Districts”) moved to dismiss the above-captioned proceeding on the grounds that the Commission lacks jurisdiction over the Petition. On June 12, 2018 the Petitioner, Superior Water Service, LLC (“Superior”) filed its Response to the Motion to Dismiss (the “Original Response”). On June 18, 2018, Superior filed an untimely Supplemental Response to the Motion to Dismiss seeking to take discovery (the “Supplemental Response”). Consistent with the Hearing Officer’s Order of June 1, 2018, the Districts hereby file this Reply in Support of their Motion to Dismiss to address the arguments made in the Original Response and the Supplemental Response.

Statement of Facts

Superior filed its Petition seeking a certificate of convenience and necessity to serve approximately 177 homes in new sections of King’s Chapel subdivision located in Williamson County, Tennessee off of Highway 96. The proposed new sections would lie in the chartered service areas of both MUD and NCGUD, straddling the boundary between them. However, in 2008, MUD and NCGUD entered in an agreement (the “Interlocal Agreement”) that allowed MUD to provide water service to those parts of King’s Chapel subdivision located in NGUD’s

chartered service area. These background facts are reflected in the Direct Testimony of John Powell, page 2, footnote 1, attached to the Petition.¹ MUD currently provides water service to all of the homes in the subdivision, which number well over 100.

Contrary to the misleading statements in Superior's Original Response, MUD has never taken the position that it cannot serve the new sections of King's Chapel subdivision with water. MUD remains committed to providing service to this area, has the ability to serve this area, and – consistent with its routine practice of ensuring that costs of new development in its service territory is born by the developer and is not subsidized by existing water customers – has set forth the conditions under which the developer can obtain water service from MUD. In fact, Exhibit 3 to the Petition is a letter from MUD's engineer setting forth the conditions by which MUD would provide service to the next section of King's Chapel subdivision at issue in this proceeding.²

The setting of such conditions by a utility district before extending service to a development is consistent with the routine practices of virtually every utility district and municipal provider of water in the State of Tennessee. To characterize the setting of such conditions as a "refusal" to provide water or an acknowledgment of an inability to serve is simply misleading. To countenance such a characterization by entertaining the Petition would dramatically change the landscape of water service in the State of Tennessee and undermine the routine practice of providing such services to new developments across the State of Tennessee.

¹ In their Joint Petition to Intervene and Motion to Dismiss, the Districts stated that the portion of King's Chapel subdivision at issue is located "within the service territory of NCGUD." Joint Petition at 1. As stated above, a closer study of the proposed sections shows that they would lie within both Districts but would be served exclusively by MUD under the Interlocal Agreement. For present purposes, the critical and undisputed fact is that the entire area at issue is within a utility district.

² The letter is dated July 5, 2017. Since that time, MUD has changed its own capital improvements plan to relieve the developer of having to make any "off-site" improvements to the water system. Therefore, the conditions of service have become much more favorable to the developer. Regardless of the exact terms, the critical fact is that MUD has always offered to provide water service to the rest of King's Chapel subdivision.

ARGUMENT

The Commission is without the statutory jurisdiction to provide the relief requested in the Petition. The area sought to be served by Superior is within the chartered services areas of duly created utility districts. By Interlocal Agreement, MUD provides water service to all of King's Chapel subdivision, and it has set forth the conditions and fees by which the developer may obtain water service. Under these facts, the Commission is without authority to grant a certificate of public convenience and necessity to Superior under the Tennessee Supreme Court's decision in *West Wilson Utility District v. Z.D. Atkins*, 442 S.W.2d 612 (Tenn. 1969). Further, given that MUD has set forth the conditions and fees by which the developer may obtain service to the area of King's Chapel subdivision at issue in the Petition, the Commission is not the proper state agency to contest these conditions and fees. State law is clear that such controversies are exclusively within the domain of the Utility Management Review Board ("UMRB").

I. The Commission Has No Jurisdiction To Issue A Certificate In Area Currently Served By A Utility District

Superior's attempts to distinguish the holding in *West Wilson Utility District v. Z.D. Atkins*, 442 S.W.2d 612 (Tenn. 1969) are wholly meritless. *West Wilson* makes clear that the Commission exceeds its jurisdiction by issuing a certificate of convenience and necessity to a water utility to provide water service in an area already served by a duly created utility district. *Id.* at 614. ("[The Commission] exceeded its jurisdiction in issuing [] a certificate of convenience and necessity to operate a public water system [] within the designated geographical area of [a utility district].")

According to Superior, *West Wilson* is distinguishable on the grounds that “it was undisputed that adequate water was available” by the utility district.”³ (Original Response, P. 2.) There is literally nothing in *West Wilson* that speaks to whether the utility district in that case could provide the water to the geographic area it served as nothing in the *West Wilson* decision even remotely mentions whether the utility district in that case had the capacity to supply the water to the proposed development.

Rather, the holding in *West Wilson* is premised solely and exclusively on the basis that the area sought to be served by the private water utility seeking a certificate from the Commission was within the geographic boundary of a duly created utility district. The decision repeatedly holds that it is the fact that the geographic area to be served is within the utility district’s service territory that is the basis of the Court’s decision (and not whether the utility district could provide water service):

We are here faced with the question of whether the Public Service Commission had jurisdiction to issue to Cumberland Water Company a certificate of convenience and necessity to operate a public water system in that area of Wilson County where West Wilson Utility District has previously been granted authority by order of the County Judge of Wilson County to operate a public water system.

...

West Wilson Utility District has an exclusive franchise to construct and operate a public water system in its designated geographical area which includes that part of Shiloh Park in Wilson County. The only method by which this franchise can be altered or modified in any way is by a petition filed in the County Court of Wilson County for that purpose.

...

³ As discussed throughout this Reply Brief, MUD vehemently disputes Superior’s contention that MUD lacks capacity to supply the water to King’s Chapel. As discussed herein, Superior’s own Petition directly contradicts this assertion.

It results that the Public Service Commission exceeded its jurisdiction in issuing to Cumberland Water Company a certificate of convenience and necessity to operate a public water system in that geographical area of Shiloh Park in Wilson County, which is within the designated geographical area of West Wilson Utility District.

West Wilson, 442 S.W. 2d at 613, 614 (emphasis added).

The Supreme Court went further in explaining its decision when it stated that “[i]f upon creation of a utility district any other agency, including the courts, be allowed by any method to modify the geographical area in the district without the matter being first heard by the creating agency (County Court), [that] could result in utter chaos.” *Id.* at 614. Granting the Petition in this matter would do nothing other than invite the “utter chaos” *West Wilson* requires this Commission avoid.

West Wilson commands that the Petition be dismissed for lack of jurisdiction because “[the Commission would] exceed its jurisdiction in issuing [] a certificate of convenience and necessity to operate a public water system [] within the designated geographical area of [a utility district].” *Id.* at 614.

Importantly, the Commission itself has already recognized the holding in *West Wilson* and its applicability to King’s Chapel subdivision. Milcrofton has brought suit against John Powell and one of his other companies for selling well water to homeowners in King’s Chapel subdivision, thereby illegally competing with MUD. TPUC is a party to that case. In a recent filing, TPUC wrote:

Moreover, it is well settled that the Commission has no jurisdiction to issue a CCN to an entity to provide services and compete with a utility district for customers and revenue within the confines of a utility district. *West Wilson Utility District v. Z.D. Atkins*, 442 S.W.2d 612, 613-14 (Tenn. 1969).

...

Furthermore, the Tennessee legislature has not assigned the Commission the authority to be the arbiter or guardian of the exclusiveness of the franchises of utility district.

See Commission Brief, Pg. 5, *Milcrofton Utility District of Williamson County v. Non Potable Well Water, Inc.*, Case No. 18-455, Davidson County Chancery Court, attached as Exhibit A hereto.

The Petition in this case runs directly contrary to *West Wilson*, the line of cases that it is based on, and the Commission's own understanding of its power under the Tennessee Code. The Commission could not grant the Petition without running afoul of these cases and the very position it has taken in pending litigation.

The Petition should and must be dismissed as the Commission has no jurisdiction to render the relief requested. *West Wilson*, 442 S.W.2d at 614 (“[The Commission] exceeded its jurisdiction in issuing [] a certificate of convenience and necessity to operate a public water system [] within the designated geographical area of [a utility district].”)

II. The Existence Of The Interlocal Agreement Does Not Alter The Commission's Jurisdiction

Superior also claims the Interlocal Agreement between the Districts allows it to petition this Commission for a certificate. (Original Response, P. 2.) Nothing in *West Wilson* would support this conclusion.

As discussed above, *West Wilson* is premised on the fact that the Commission lacks authority to undermine a utility's “exclusive franchise” and expose it to competitors. Since it remains undisputed that the King's Chapel subdivision is within the geographic boundary of a utility district, the holding of *West Wilson* applies. *Id.* at 614. Whether any given part of the subdivision is inside the boundaries of MUD, NGUD, or both is immaterial.

It also does not matter whether a utility district would provide service on its own accord or through a duly executed Interlocal Agreement under Tenn. Code Ann. § 12-9-108. So long as the territory sought to be served is within the geographic boundary of a utility district, *West Wilson* must apply. *Id.* at 614.

Superior argues that NGUD “conceded” its exclusive right to serve the subdivision under Tenn. Code Ann. § 7-82-301(a)(1)(B) by entering into the Interlocal Agreement. (Original Response, P. 2-3.) This is a gross mischaracterization of the Interlocal Agreement. One governmental entity, MUD, has simply assumed another governmental entity’s, NGUD’s, water service to part of the subdivision. State law allows this. *See* Tenn. Code Ann. § 12-9-108.

Only the county mayor (formerly the county executive or county court) can decide that “the public convenience and necessity require[] other or additional services” within a utility district pursuant to Tenn. Code Ann. § 7-82-301(a)(1)(B). *See West Wilson*, 442 S.W.2d at 614 (“The only method by which this franchise can be altered or modified in any way is by a petition filed in the County Court of Wilson County for that purpose.”); *Town of Rogersville ex rel. Rogersville Water Comm’n v. Mid Hawkins Cty. Util. Dist.*, 122 S.W.3d 137, 139-40 (Tenn. Ct. App. 2003) (same).

The Commission cannot make that determination, as it well recognizes. *See* Commission Brief, Pg. 5, *Milcrofton Utility District of Williamson County v. Non Potable Well Water, Inc.*, Case No. 18-455, Davidson County Chancery Court (“[T]he Tennessee legislature has not assigned the Commission the authority to be the arbiter or guardian of the exclusiveness of the franchises of utility district.”).

III. Disputes Between Developers And Utility Conditions Regarding The Reasonableness Of Conditions For Utility Service By A Utility District Are Committed In The First Instance To The Utility Management Review Board.

Although the county mayor typically handles questions about a utility district's service area, the UMRB handles this particular kind of dispute. Contrary to Superior's assertions that MUD cannot provide the water needed to serve the King's Chapel subdivision, Superior's own Petition contains a letter setting forth the conditions upon which Milcrofton will serve the King's Chapel subdivision. (Petition, Ex. 3.) Superior may believe these conditions were unreasonable or unwarranted, and Superior may continue to believe that about the current terms offered by MUD, but disputes such as these between a utility district and a developer may only be heard and resolved by the Utility Management Review Board (the "UMRB") pursuant to T.C.A. § 7-82-702(9). Specifically, the Tennessee Code provides that the UMRB has authority to:

(9) Review and conduct an informal hearing of any decision of any utility district upon a written request of any ... developer concerning the justness and reasonableness of the utility district's requirement that the ... developer build utility systems to be dedicated to the utility district or the justness and reasonableness of fees or charges against the ... developer related to the utility systems....

Tenn. Code Ann. § 7-82-702(9); *see also American Heritage Apartments v. The Hamilton County Water and Wastewater Treatment Authority*, 494 S.W.3d 31 (Tenn. 2016) (implying that a customer in a dispute with a utility district must exhaust his administrative remedies by going before the Utility Management Review Board before filing suit against the utility district).

The developer disagrees with MUD over the terms and conditions under which the MUD will provide water service to King's Chapel, but any honest reading of MUD's letter demonstrates that MUD is committed to serving the King's Chapel subdivision. (Petition, Ex. 3.) Superior consistently misrepresents this letter as stating that MUD does not have the ability to

serve this area, but this assertion is flatly contradicted by the plain language of the letter itself which states as clear as day, “If [the developer] wish[es] for the District to proceed with the design of the public water line system for the above referenced project...the following fees would need to be paid to the District...”

In other words, MUD is willing, able, and ready to serve King’s Chapel so long as the relevant conditions are met by the developer and the applicable fees are paid. (Petition, Ex. 3.) The developer could have possibly challenged the reasonableness of these conditions and fees if it had filed a timely petition with the UMRB under Tenn. Code Ann. § 7-82-702(9), but nothing in Title 7 or Title 65 of the Tennessee Code would allow a developer, aggrieved by such conditions and fees, to petition the Commission to create a wholly new and unnecessary public utility to allow the developer to avoid its obligations proposed by the authorized utility.

On this basis alone, the petition should be denied as the proper place to handle disagreements between the conditions and fees imposed by a utility district upon a developer is with the UMRB. Tenn. Code Ann. § 7-82-702(9).

IV. Superior’s Request For Discovery Should Be Denied.

At the May 22, 2018, status conference, Superior asked to take discovery before the Hearing Officer ruled on the motion to dismiss. The Hearing Officer heard arguments for and against the request and stated that she would not allow discovery because the motion to dismiss raises a threshold legal issue of jurisdiction.⁴ Superior is now making the same request. Strangely, it does not acknowledge what happened at the status conference or argue that the Hearing Officer was in error to deny discovery then. Discovery is still unnecessary and inappropriate pending a decision on the motion to dismiss.

⁴ For similar reasons, the Hearing Officer also stated that she would not unseal Exhibit 6 to the Petition, which purportedly contains information about John Powell’s financial resources, prior to a ruling on the motion to dismiss.

Before the Commission allows this Proceeding to proceed to the discovery phase, the threshold issue of whether the Commission even has jurisdiction must and should be addressed. As discussed herein, the *West Wilson* decision clearly holds that the Commission does not have authority to grant the relief requested in the Petition and thereby allow a private water system to take over service to the geographic area covered by a utility district. If the Commission lacks jurisdiction, then it cannot require the parties to engage in discovery. Furthermore, no discovery is needed to shed light on the application of *West Wilson* to the present case. In fact, the Supplemental Response does not even identify a single fact that would clarify the issues presently pending in the motion to dismiss. As a result, Superior's request for discovery should be denied once again.

Conclusion

The Districts ask that the Petition be dismissed.

Respectfully submitted,

By: 

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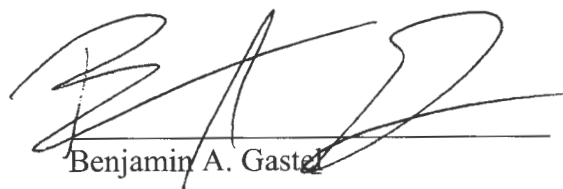
CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of June, 2018, a copy of the foregoing document was served on the parties of record, via electronic delivery and U.S. Mail, postage prepaid, addressed as follows:

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