From: Melissa Ashburn, MTAS Legal Consultant
Re: Provision of utility services
Date: March 2022

Question/inquiry:

> Utility service to customer inside our city limits, in area annexed in recent years: We've always heard that since the property is located inside the city, we as the municipal utility board would have the first right to serve that customer although we may not currently have service in front of that property. Is there a law that says that we would have the right to serve that customer?

Response from MTAS:

Utility service territories are set by the federal government when awarding grants to utilities under the Rural Development Loan program run by the USDA. A city charter cannot prohibit another utility from serving areas inside city limits, and attempted enforcement of such would be particularly problematic for areas that are annexed and brought into city limits after adoption of the operative charter language.

Even if no lines are currently installed, it is probable these properties are located within another utility's service area. If the utility serving the area has received federal grants or loans, then this language from the US Code protects that service territory:

> (b) Curtailment or limitation of service prohibited
> The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.
> 7 U.S.C.A. § 1926 (West)

The Sixth Circuit Court of Appeals explains the application of this language:

> This Court has repeatedly interpreted this provision as preventing "local governments from expanding into a rural water association's area and stealing its customers[.]" *Le–Ax Water Dist.,* 346 F.3d at 705; *see Lexington–South Elkhorn Water Dist.,* 93 F.3d at 233 ("The service provided ... through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body ... during the term of such loan"). Therefore, § 1926(b) "should be given a liberal interpretation that protects rural water associations indebted to the [RECDS] from municipal encroachment." *Vill. of Grafton,* 419 F.3d at 566–67 (quoted case omitted).
>
> Ross Cty. Water Co. v. City of Chillicothe, 666 F.3d 391, 397 (6th Cir. 2011)

This language is in our State laws governing utility districts:

> (a)(1)(A) From and after the date of the making and filing of an order of incorporation, the district so incorporated shall be a "municipality" or public corporation in perpetuity under its corporate name, and the district shall in that name be a body politic and corporate with power of perpetual succession, but without any power to levy or collect taxes. Charges for services authorized in this chapter shall not be construed as taxes. The powers of each district shall be vested in and exercised by a majority of the members of the board of commissioners of the district.
> (B) So long as the district continues to furnish any of the services that it is authorized to furnish in this chapter, **it shall be the sole public corporation empowered to furnish such services in the district**, and no other person, firm or corporation shall furnish or attempt to furnish any of the services in the area embraced by the district, unless and until it has been established that the public convenience and necessity requires other or additional services; provided, that this chapter shall not amend or alter §§ 6-51-101 -- 6-51-111, and 6-51-301.
> Tenn. Code Ann. § 7-82-301 (West) (emphasis added)

The utility essentially holds a "right of first refusal" when it comes to utility services within their territory:

> More recently, in *Town of Rogersville, ex rel. Rogersville Water Comm'n v. Mid Hawkins County Util. Dist.,* 122 S.W.3d 137, 140 (Tenn.Ct.App.2003), we held that the *sole* remedy available to parties dissatisfied with a utility's service is to petition to modify the utility's exclusive franchise under Tenn.Code Ann. § 7-82-301(a). Also, in determining whether public convenience and necessity requires additional services, it is inappropriate to perform a "comparative analysis" between the two service providers. *Id.* at 140, n. 2. Instead, the inquiry is whether the utility district refuses or is not able to provide utility service to that area. *Id.* Dyersburg Suburban Consol. Util. Dist. v. City of Dyersburg, No. W2006-01704-COA-R3CV, 2007 WL 1859460, at *4 (Tenn. Ct. App. June 29, 2007)(emphasis added)

To evaluate the city utility's authority to provide service to the area, or the likelihood of success in expanding the city's service area, the following analysis must be applied to the utility which currently serves part of that area:

> To establish that it is entitled to protection under § 1926(b), RCWC must show that "(1) it is an 'association' within the meaning of the Act; (2) it has a qualifying outstanding [RECDS] loan obligation; and (3) it has provided or made service available in the disputed area." *Lexington–South Elkhorn Water Dist.,* 93 F.3d at 234. To satisfy the third and final prong, RCWC must demonstrate it has "pipes in the ground" that provide service within or adjacent to the disputed area, *id.* at 233, 237, and that it has the legal right under state law to serve the disputed area. ***398** *Vill. of Grafton,* 419 F.3d at 566. If RCWC establishes these facts, it is entitled to § 1926(b)'s protection.
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> Ross Cty. Water Co. v. City of Chillicothe, 666 F.3d 391, 397–98 (6th Cir. 2011)

What information is known concerning utility service in the area in question? Has service been refused to property owners? Have developers approached the utility with proposals to extend services? If requests for service have been denied by the utility, and if there are no "pipes in the ground," then the city *may* have the legal right to permit a developer to construct an extension and hook into the city's system. However, the city should first carefully document the utility district's failure to provide requested service, consult with TDEC and consult with the City Attorney before making a determination to serve the area.

I hope this is helpful.

Melissa Ashburn
MTAS Legal Consultant