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Opinion No. 04-134

"Utility Water Service" under Tenn. Code Ann. § 6-51-301(a)(1)

QUESTION

Under Tenn. Code Ann. § 6-51-301(a)(1), no city may render "utility water service" outside its boundaries when all of the area to be served is included within the scope of a certificate from an appropriate regulatory agency authorizing some other person, firm, or corporation to render utility water service. Does a city's provision of sewer service come within the meaning of "utility water service" under this statute in light of *Lynnwood Utility Company v. Franklin,* No. 89-360-II, 1990 WL 38358 (M.S. Tenn.Ct.App. April 6, 1990)?

OPINION

In *Lynwood,* the Court of Appeals expressly declined to hold that the term "utility water service" as used in the statute included sewer service. This case, therefore, does not provide binding legal authority for including sewer service within that term. Because Tennessee statutes generally list water and sewer service as separate services, a court is likely to conclude that the term "utility water service" as used in Tenn. Code Ann. § 6-51-301(a) does not include a sanitary sewer system. But other statutes, including Tenn. Code Ann. § 7-51-401(c) and Tenn. Code Ann. § 7-82-301(a), could also prohibit a city from extending sewer service beyond its city boundaries.

ANALYSIS

This opinion concerns the definition of "utility water service" as used in the following statute:

> Notwithstanding any other law, public or private, to the contrary, no municipality may render utility water service to be consumed in any area outside its municipal boundaries when all of such area is included within the scope of a certificate or certificates of convenience and necessity or other similar orders of the Tennessee regulatory authority or other appropriate regulatory agency outstanding in favor of any person, firm or corporation authorized to render such utility water service.

Tenn. Code Ann. § 6-51-301(a). The request refers to an unpublished opinion of the Tennessee Court of Appeals for the Middle Section, *Lynnwood Utility Company v. Franklin*, No. 89-360-II, 1990 WL 38358 (M.S. Tenn.Ct.App. April 6, 1990). That case actually addressed a city's obligation to pay damages suffered by a sewer company when the city annexed land within the company's service territory and decided to provide sewer service to the area. That requirement is in the third sentence of Tenn. Code Ann. § 6-51-301(a)(1), which is not quoted above. The Court stated that it would "assume without holding" that the term "utility water service" in the statute included sewer service provided by the company. But the Court found that the utility company had suffered no damages under the statute because it did not provide service to the annexed area. The Court, therefore, expressly declined to hold that the term "utility water service" as used in the statute included sewer service. This case, therefore, does not provide binding legal authority for including sewer service within that term.

The term "utility water service" is not used in any other Tennessee statute. Other statutes expressly mention water and sewer service, reflecting an assumption that the two types of services are different. For example, Tenn. Code Ann. § 6-51-102, also a part of the statutory annexation scheme, refers to a plan of services that must include, among others, "water service" and "sanitary sewer service." Tenn. Code Ann. § 6-51-102(b)(2). Tenn. Code Ann. § 7-35-201(1) authorizes a city "also providing water services" to a property to terminate water service to a customer that refuses to connect to a city sanitary sewer system. Under Tenn. Code Ann. § 6-54-122(f), a statute on eminent domain procedure does not apply to eminent domain by a city to acquire property interests to be used to benefit a municipal utility, including "water utility services" and "sewer utility services." Based on these statutes, a court is likely to conclude that the term "utility water service" as used in Tenn. Code Ann. § 6-51-301(a) does not include a sanitary sewer system.

Depending on the facts and circumstances, other statutes would also be relevant to this issue. Under Tenn. Code Ann. § 7-51-401(a), with one exception, a city is authorized to extend its sewage collection and treatment services outside its boundaries to customers desiring the service. But subsection (c) of the statute provides:

> No such . . . municipality . . . shall extend its services into sections of roads or streets *already occupied by other public agencies rendering the same service*, so long as such other public agency continues to render such service.

Tenn. Code Ann. § 7-51-401(c) (emphasis supplied). The statute does not define the term "public agency," but it clearly includes a utility district operating under Tenn. Code Ann. §§ 7-82-101, *et seq.*, and arguably includes a utility company holding a certificate of authority from the Tennessee Regulatory Authority. Under this statute, therefore, a city would be prohibited from extending sewer service to an area outside its boundaries that is already being served by a public agency. In addition, a utility district is the sole public corporation empowered to furnish authorized services in its territory, "unless and until it has been established that the public convenience and necessity requires other or additional services[.]" Tenn. Code Ann. § 7-82-301. Under this statute, a city would be

prohibited from extending sewer service to an area outside its boundaries and within the service area of a utility district authorized to furnish sewer services, unless it were established that the public convenience and necessity requires other or additional services. This Office has concluded that a city may petition the county executive to limit the service area of a utility district or otherwise allow the municipality to serve the area. Op. Tenn. Att'y Gen. 02-110 (October 4, 2002).

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