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Opinion No. 11-53

Powers of Water and Wastewater Treatment Authority Outside of its Service Area

## QUESTIONS

1. The Hamilton County Water and Wastewater Treatment Authority (the "Authority") was created under Tenn. Code Ann. §§ 68-221-601, *et seq.* Is the Authority authorized to provide sewer services to customers located in Lookout Mountain, Georgia?

2. If the answer to question 1 is yes, is the Authority authorized to own parts of the sewer system, including easements, piping, and pump stations, that are located in Georgia?

3. A private developer has proposed creating a private residential development in Meigs County, Tennessee, which borders on Hamilton County. The developer would build a private sewer system in a subdivision and then transfer ownership and operation of the system to the Authority. Is the Authority authorized to accept the system and operate it in Meigs County, Tennessee?

4. A private developer has proposed creating a private residential development in Catoosa County, Georgia, which borders on Hamilton County. The developer would build a private sewer system in a subdivision and then turn over all ownership and operations to the Authority. Is the Authority authorized to accept the system and operate it in Catoosa County, Georgia?

## OPINIONS

1. Yes, under its governing statute, the Authority is authorized to provide sewer service to customers located in Lookout Mountain, Georgia. Should the Authority opt to provide this service, the Authority would also be subject to any applicable Georgia law as well as the rights and powers of any local government or private utility providing service in the same area.

2. Yes, under its governing statute, the Authority is authorized to acquire and operate any property necessary to provide sewer service in Georgia. As stated in the answer to Question 1, the Authority would then be subject to any applicable Georgia law and to the rights and powers of any local government or private utility providing service in the same area.

3. Yes, under its governing statute, the Authority is authorized to own and operate a treatment works in Meigs County, Tennessee. The Authority nonetheless is subject to the rights and powers of any local government or private utility providing service in the same area.

4. Yes, under its governing statute, the Authority is authorized to own and operate a treatment works in Catoosa County, Georgia. As stated in the answer to Questions 1 and 2, the Authority would also be subject to any applicable Georgia law and the rights and powers of any local government or private utility providing service in the same area.

## ANALYSIS

### Introduction

This opinion concerns the authority of the Hamilton County Water and Wastewater Treatment Authority (the "Authority") to own and operate utility systems outside its service area. The Authority was created under Tenn. Code Ann. §§ 68-221-601, *et seq.* According to the Authority's web site, the Authority is responsible for the public sewer system in the unincorporated areas of Hamilton County, Tennessee and in East Ridge, Lakesite, Lookout Mountain, Red Bank, Ridgeside, Signal Mountain, and Soddy Daisy. http://www.hamiltontn.gov/wwta/comunity.html/. All of these cities are incorporated in Tennessee and located in Hamilton County.

Under Tenn. Code Ann. § 68-221-604, a city, metropolitan government, or county may create a water and wastewater treatment authority. The government creating the entity and any participating governmental entity are authorized by agreement to transfer their treatment works properties, functions, service areas, and outstanding obligations to the authority. Tenn. Code Ann. § 68-221-604(e)(1). The term "participating governmental entity" means:

> any utility district, metropolitan government, city, town or county; which utility district, city, town or county, pursuant to a resolution of its governing body, shall have sold, leased, dedicated, donated or otherwise conveyed its water or wastewater treatment works, or both, or a portion thereof, to the authority for operation by the authority in order to make such treatment works an operational part of its treatment works[.]

Tenn. Code Ann. § 68-221-603(7). Subsection (9) of the statute defines the term "treatment works" to mean:

> any devices and systems used in the storage, treatment, recycling and reclamation of sewage or industrial wastes of a liquid nature to restore and maintain the chemical, physical and biological integrity of the state's waters, or any devices and systems used in the treatment and distribution of water, including intercepting sewers, outfall sewers, sewage collection systems, water storage facilities, water transmission lines, pumping, power and other equipment, and their appurtenances, extensions, improvements, remodeling, additions and alterations thereof; elements

> essential to provide a reliable recycled supply, such as standby treatment units and clear well facilities, and any works.

Tenn. Code Ann. § 68-221-607 lists the powers of an authority created under this statute. The statute provides in relevant part:

> (a) An authority *has all powers necessary to accomplish the purposes of this part* (excluding the power to levy and collect taxes) including, but not limited to, the following:
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> * * * *
>
> (2) Plan, establish, acquire, construct, improve and operate one (1) or more treatment works *within or without* the creating and participating governmental entities and within this state and *within any adjoining state*;
>
> (3) Acquire real or personal property of any interest therein *by gift, lease or purchase, for any of the purposes herein provided*; and to sell, lease or otherwise dispose of any such property[.]

Tenn. Code Ann. § 68-221-607(a)(2) and (3) (emphasis added).

These statutes must be read together with Tenn. Code Ann. § 5-6-120, which provides:

> (a)(1) The duties of the county mayor in regard to any petition filed pursuant to title 7, chapter 82 [referring to creation and changes to the service area of utility districts], are transferred to the water and wastewater treatment authority board under title 68, chapter 221, part 6 in any county that has created such authority. Such petitions may be granted if the board determines in its sole discretion that the public convenience and necessity require the same. *The general assembly enacts this section as a statement of its intent that this section is a clarification of title 68, chapter 221, part 6.* From and after the creation of a water and wastewater treatment authority and the establishment of its service area, the authority shall be the sole and exclusive provider of its authorized services in its service area. The designated service area for any particular function or service shall not include any area located within the boundaries of another governmental entity providing the same function or service on the date the service area is established. Different service areas may be established for different functions or services. The authority may cede all or any portion of its functions or service area to another governmental entity upon the board determining in its sole discretion that the public convenience and necessity require the same.
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> (2) Notwithstanding any provision of law to the contrary, the *transfer of duties* as provided in subdivision (a)(1) do not apply to a county which:
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> (A) Is served by a water and wastewater treatment authority that does not provide water service;

> (B) Has its water provided by more than five (5) utility districts; and
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> (C) Has, under state law, had its county mayor hear petitions of utility districts.
>
> (b) The authority granted in this section shall prevail over any other provision of the law to the contrary for all water and wastewater service providers proposing to provide such services *in the service area of the authority*. Any city proposing to provide such services in the service area of the authority shall have authorization to do so only by filing a petition in the manner established by this section and receiving a cession by the authority.

(Emphasis added). This Office does not have sufficient facts to determine whether Hamilton County falls within the conditions listed in (a)(2) of this statute. Even if it does, however, the other provisions in (a)(1) clarifying an authority's service area would still apply to the Authority.

1. Contractually Providing Sewer Service in Lookout Mountain, Georgia

The first question is whether the Authority is authorized to provide sewer service to customers located in Lookout Mountain, Georgia. We assume that Lookout Mountain, Georgia and Lookout Mountain, Tennessee are two separately incorporated cities on each side of the Georgia/Tennessee boundary. Under Tenn. Code Ann. § 68-221-607(a)(2), the Authority is authorized to [p]lan, establish, acquire, construct, improve and operate one (1) or more treatment works *within or without* the creating and participating governmental entities and within this state and *within any adjoining state[.]"* (Emphasis added). Clearly, then, under its governing statute, the Authority is authorized to provide sewer service to customers located in Lookout Mountain, Georgia. But the Authority is also subject to any applicable Georgia law and the rights and powers of any local government or private utility providing service in the same area. This Office is unaware of which local governments or private companies, if any, are providing sewer service in the area in question.

Under Tennessee law, a Tennessee public agency may contract with another public agency to perform any governmental service that each agency entering into the contract is authorized by law to perform. Tenn. Code Ann. § 12-9-108. The Authority would be a "public agency" with this power. The term "public agency" includes any political subdivision of this state or of another state. Tenn. Code Ann. § 12-9-103(3). The laws creating the Authority are to be liberally construed to effect their purpose. Tenn. Code Ann. § 68-221-617. Accordingly, the Authority is a "public agency" authorized to contract with other public agencies, including those of another state, under Tenn. Code Ann. § 12-9-108.

Georgia law also authorizes counties and cities to contract with any one or more public agencies of another state to perform any governmental service each public agency entering into the contract is authorized to perform. Ga. Code Ann. § 36-69A-8. The term "public agency" under that statute also includes any political subdivision of another state. Ga. Code Ann. § 36-69A-3. Thus, an interlocal agreement between the Authority and the City of Lookout Mountain, Georgia could provide a legal framework for the Authority to provide these services.

2. Owning and Operating a Sewer System in Lookout Mountain, Georgia

The second question is whether, the Authority may own parts of the sewer system, including easements, piping, and pump stations, that are located in Georgia, given the Authority has the power to provide sewer service in Lookout Mountain Georgia. As previously discussed, the Authority's governing statute expressly authorizes it to own and operate a treatment works outside the State of Tennessee. Tenn. Code Ann. § 68-221-607(a)(2). Subsection (a)(3) of the same statute authorizes the Authority to "[a]cquire real or personal property or any interest therein by gift, lease or purchase, for any of the purposes herein provided[.]" Tenn. Code Ann. § 68-221-607(a)(3). Those purposes would include operating a treatment works. For this reason, under its governing statutes, the Authority may own parts of the sewer system, including easements, piping, and pump stations, that are located in Georgia. The Authority would be subject to any applicable Georgia law, including property law, and the rights and powers of any local government or private utility providing service in the same area.

3. Owning and Operating a Sewer System in Meigs County, Tennessee

The next question concerns a proposed private development in the adjacent county of Meigs, Tennessee. A private developer has proposed creating a private residential development in Meigs County, Tennessee. The developer would build a private sewer system in a subdivision and then transfer ownership and operation of the system to the Authority. The request asks whether the Authority is authorized to accept this privately developed system and operate it in Meigs County, Tennessee.

The Authority by its governing statutes is expressly authorized to own and operate a treatment works "within or *without* the creating or participating governmental entities" and within Tennessee. Tenn. Code Ann. § 68-221-607(a)(2) (emphasis added). Thus, the Authority is authorized to accept and operate a privately developed sewer system in Meigs County, Tennessee.

The Authority, however, is subject to the rights and powers of any local government or private utility providing service in the same area. We base this conclusion in part on Tenn. Code Ann. § 5-6-120(a)(1). Under that statute, a water and wastewater treatment authority is the sole and exclusive provider of its authorized services in its "service area." The statute then states:

> The designated service area for any particular function or service shall not include any area *located within the boundaries of another governmental entity* providing the same function or service on the date the service area is established.

(Emphasis added). Thus, the Authority may not extend its service area into Meigs County and become the exclusive provider of sewer services there if the area in question falls within the boundaries of another governmental entity already providing the service. The Authority's power is in effect limited by any exclusive or contractual right of another governmental entity to provide service in that area. For example, so long as a utility district continues to furnish any of the utility services it is authorized to furnish, it is ordinarily the sole public corporation authorized to

provide these services within the district. Tenn. Code Ann. § 7-82-301(a)(1)(B). Courts have concluded that the exclusive franchise area of a utility district can only be modified by the county executive for the county in which the petition for incorporation was presented and granted. *City of Crossville v. Middle Tennessee Utility District,* 208 Tenn. 268, 345 S.W.2d 865, 867 (1961); *White House Gas Utility District v. Cross Plains Natural Gas Utility District*, 60 Tenn. App. 162, 445 S.W.2d 459 (1969). *See also* Op. Tenn. Att'y Gen. 02-110 (October 7, 2002); Op. Tenn. Att'y Gen. 00-67 (April 6, 2000) (process for changing a utility district's service area). Our Office has also opined that a county is authorized to grant an exclusive franchise for utility services within its territory. Op. Tenn. Att'y Gen. 98-233 (December 15, 1998). Finally, the Authority's power to provide services within the county would also be subject to any private utility furnishing these services under such a franchise.

4. Owning and Operating a Sewer System in Catoosa County, Georgia

The last question concerns a proposed project in the adjacent county of Catoosa County, Georgia. A private developer has proposed creating a private residential development in this county. The developer would build a private sewer system in a subdivision and then transfer all ownership and operations to the Authority. The question is whether the Authority is authorized to accept and operate the system in Catoosa County, Georgia.

As discussed in the answers to Questions 1 and 2, statutes governing the Authority authorize it to own and operate a treatment works in Georgia. The Authority would be subject to any applicable Georgia law and the rights and powers of any local government or private utility providing service in the same area.

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