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TO: PSC DATE: 5-16-12
FAX NO. 564-3460 PAGES: 6, including cover sheet
FROM: Robert Moore CLIENT: Forest Creek

MESSAGE: Please file today - Thank you

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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the matter of:

FOREST CREEK, LLC)

COMPLAINANT)

vs.)

JESSAMINE- SOUTH ELKHORN WATER DISTRICT)

DEFENDANT)

Case No. 2011-00297

MEMORANDUM OF FOREST CREEK, LLC, IN OPPOSITION TO SOUTH ELKHORN WATER DISTRICT'S MOTION TO DISMISS COMPLAINT AND ALTERNATIVELY, MOTION TO SUSPEND PROCEEDINGS AND SUPPLEMENT THE RECORD

Comes Forest Creek, LLC ("Forest Creek"), by counsel, and for its Memorandum in Opposition to Jessamine - South Elkhorn Water District's ("Water District") Motion to Dismiss Complaint and Alternatively, Motion to Suspend Proceedings and Supplement the Record ("Motion"), states as follows.

The Water District's Motion should be denied because:

- 1) The substance of the April 10, 2012 email from James Kelley, a member of Forest Creek, to Gerald Wuetcher, Commission Staff, which is the primary basis for the Motion, did not concern this case, and was not read by Mr. Wuetcher;
- 2) The Motion is based as well upon proper discussions between Commission Staff and Forest Creek representatives that occurred long before August 5, 2011, the date that

Forest Creek filed its Complaint herein, and the Water District admittedly engaged in its own discussions with Commission Staff prior to August 5, 2011; and,

- 3) The Water District's Motion is a thinly veiled challenge to the Commission's jurisdiction to hear and rule upon Forest Creek's Complaint, which is yet another attempt to delay the resolution of this matter.

The Water District's assertion that Forest Creek's Complaint against it should be dismissed is completely without merit. The Water District's Motion first refers to James Kelley's email of April 10, 2012, to Gerald Wuetcher and the undersigned. The subject line of this email states "FW: Forest Creek , LLC v. Snowden et al. - Case No. 12-CI-81". Accordingly, this communication did not concern the above styled matter. Furthermore, Mr. Wuetcher responded the very next day to Mr. Kelley's email by stating:

I have not reviewed nor do I intend to review these documents. Please advise your client that all communications to the PSC should come through counsel. If he intends to contact any member of Commission Staff directly, he should copy all parties of record.

(See Appendix C to the Water District's Motion). Even though the email and documents did not concern this matter, Mr. Wuetcher acted properly in declining to read the information, and there is no basis for the Water District's Motion. The Water District itself tacitly admits that there was no substantive information exchanged by stating that "James Kelley an executive with Forest Creek, contacted Mr. Wuetcher and *attempted* to provide ex parte information" (Motion at Page 6) Contrary to the Water District's assertion, Mr. Wuetcher's response did resolve the matter since Mr. Kelley has been advised that he can only contact PSC staff through counsel and he has made no further attempts to communicate with Mr. Wuetcher. The Water District is

unable to cite the Commission to any facts or legal precedent in support of its Motion, and it should be dismissed.

In a futile effort to add merit to the motion, the Water District refers to an email communication between Mr. Kelley and Mr. Wuetcher dated May 12, 2010. Of course, this communication occurred more than 14 months before Forest Creek filed its August 5, 2011, Complaint against the Water District. Based upon this contact, the Water District then makes unfounded allegations that there must have been improper *ex parte* contacts between PSC representatives and Forest Creek involving this case. These allegations are ironic based on the fact that the Water District's own representatives met with PSC representatives on November 30, 2010, outside the presence of Forest Creek. Simply put, Forest Creek and the Water District both had the right to engage in discussions with Commission Staff prior to the filing of Forest Creek's Complaint, and there is no evidence that improper *ex parte* communications concerning this case occurred after Forest Creek's Complaint was filed. Again, the Water District's Motion must be denied.

KRS 278.260(1) provides that:

The commission shall have original jurisdiction over complaints as to rates or service of any utility, and upon a complaint in writing made against any utility by any person . . . that any regulation, measurement, practice or act affecting or relating to the service of the utility or any service in connection therewith is unreasonable, unsafe, insufficient or unjustly discriminatory, or that any service is inadequate or cannot be obtained, the commission shall proceed, with or without notice, to make such investigation as it deems necessary or convenient.

The Commission previously relied upon this statute in ruling that it has exclusive jurisdiction over Forest Creek's Complaint. (See Commission's March 16, 2012 Order). Similarly, the Jessamine Circuit Court, by Order entered on August 24, 2011, ruled that the Commission has

exclusive jurisdiction over Forest Creek's Complaint, and dismissed the matter pending before it for lack of jurisdiction. The Water District has appealed the Jessamine Circuit Court's ruling. The Commission previously denied the Water District's motion requesting the deferral of the hearing in this matter for the 18 to 24 months that it will take before a decision is issued in the appeal. It appears that the Water District is desperate to avoid having the Commission review the merits of Forest Creek's Complaint and the Water District's practices with respect to applications for water line extensions by filing the following:

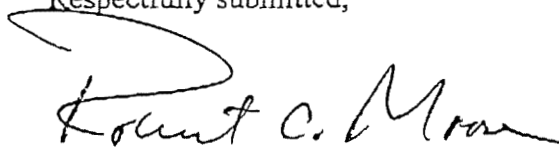
- 1) Motion to Hold in Abeyance;
- 2) Reply to Response of Forest Creek and Motion to Dismiss for Lack of Jurisdiction;
- 3) Motions for Rehearing/Reconsideration, to Stay Procedural Schedule and/or to Bifurcate and/or Modify Procedural Schedule to Provide for Informal Conference; and,
- 4) Motion to Dismiss Complaint and Alternatively, Motion to Suspend Proceedings and Supplement the Record.

The Water District continues to file frivolous motions such as this in order to avoid having to address the merits of Forest Creek's Complaint. The Commission should reject the Water District's tactics and should deny its Motion in all its parts. This is particularly true where the Water District has asked in its Supplemental Information Requests to Forest Creek for information concerning all communications between Forest Creek and PSC representatives concerning Forest Creek's Complaint, Option I and the Interim Water Service Agreement, including documents related thereto. (See the Water District's Supplemental Information Requests Nos. 2 and 3).

Conclusion

The Commission should deny the Water District's Motions based on the fact that the email which is the primary basis for the Motion did not concern this case and its substantive provisions were not read by Mr. Wuetcher. Any discussions between Commission Staff and Forest Creek representatives prior to August 5, 2011, were completely proper and furthermore, the Commission clearly has exclusive jurisdiction over Forest Creek's Complaint. Thus, there is no valid reason to supplement the record or to hold this matter in abeyance.

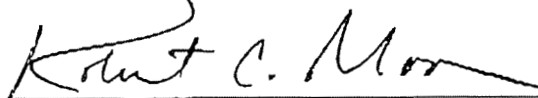
Respectfully submitted,



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Counsel for Forest Creek, LLP

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served by first class mail, postage prepaid, this the 16th day of May, 2012, to, Hon. Bruce E. Smith, **BRUCE E. SMITH LAW OFFICES, PLLC**, 201 South Main Street, Nicholasville, Kentucky 40356.



Robert C. Moore