



**STOLL
KEENON
OGDEN**
P L L C

300 WEST VINE STREET
SUITE 2100
LEXINGTON, KY 40507-1801
MAIN: (859) 231-3000
FAX: (859) 253-1093

ROBERT M. WATT, III
DIRECT DIAL: (859) 231-3043
DIRECT FAX: (859) 246-3643
Robert.Watt@skofirm.com

December 18, 2014

HAND DELIVERED

Hon. Jeff Derouen
Executive Director
Public Service Commission
211 Sower Boulevard
P.O. Box 615
Frankfort, KY 40601

RECEIVED

DEC 18 2014

**PUBLIC SERVICE
COMMISSION**

Re: Jessamine South Elkhorn Water District
Case No. 2014-00084

Dear Mr. Derouen:

We enclose for filing an original and ten copies of the Response of Forest Hills Residents' Association, Inc. to the Motion of Jessamine-South Elkhorn Water District to Submit the Application for Determination on the Record, et seq. in the above-captioned case. Thank you in advance for your assistance. Best regards.

Sincerely,

Robert M. Watt, III

rmw:rmw
Enclosures
cc: Counsel of Record (w/encl.)

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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

DEC 18 2014

PUBLIC SERVICE
COMMISSION

In the Matter of:

APPLICATION OF JESSAMINE-SOUTH)
ELKHORN WATER DISTRICT FOR A)
CERTIFICATE OF PUBLIC)
CONVENIENCE AND NECESSITY TO)
CONSTRUCT AND FINANCE A)
WATERWORKS IMPROVEMENT)
PROJECT PURSUANT TO KRS 278.020)
AND 278.300)

CASE NO. 2014-00084

FOREST HILLS RESIDENTS' ASSOCIATION, INC.'S RESPONSE TO JESSAMINE SOUTH-ELKHORN WATER DISTRICT'S MOTION TO SUBMIT THE APPLICATION FOR DETERMINATION ON THE RECORD, OR IN THE ALTERNATIVE TO COMPEL INTERVENOR'S RESPONSES TO CERTAIN OF THE APPLICANT'S DATA REQUESTS AND TO DEFINE THE SPECIFIC ISSUES TO BE ADDRESSED AND LIMIT THE EVIDENTIARY HEARING TO THOSE ISSUES, AND TO POSTPONE THE DATE FOR THE SUBMISSION OF REBUTTAL TESTIMONY

Forest Hills Residents' Association, Inc. ("Forest Hills") respectfully submits this Response to the above-referenced motion of Jessamine-South Elkhorn Water District ("JSEWD"). JSEWD first asks the Commission to reverse itself and cancel the scheduled hearing. JSEWD alternatively claims that unless Forest Hills is required to divulge the specific issues for which Forest Hills plans to cross examine its witnesses, it will be "ambush[ed]" at hearing, which is unfair because this is not litigation among private parties. JSEWD makes this argument while simultaneously requesting the Commission to essentially enter a directed verdict against Forest Hills because JSEWD claims Forest Hills' "direct evidence" is insufficient to warrant a hearing. JSEWD's entire motion fails because it is premised on the erroneous assumption that Forest Hills, an intervenor, has a burden of proof in this proceeding. Because

JSEWD's motion is not supported by fact or law, and further prejudices Forest Hills, Forest Hills respectfully requests the Commission deny the motion in its entirety by (1) proceeding with the already-scheduled hearing; (2) denying JSEWD's request to compel additional discovery responses; and (3) denying JSEWD's request to tender late rebuttal testimony. In further support of this response and the relief requested herein, Forest Hills states as follows:

I. Forest Hills' "Evidence" Is Irrelevant to the Need for a Hearing.

In seeking to cancel the hearing currently scheduled for February 10, 2014, JSEWD is asking the Commission to reverse itself because the need for a hearing was the subject of contested briefing in September 2014. On October 13, 2014, the Commission granted Forest Hills' request for a hearing because of the "complexity of the issues" in this case. JSEWD's present motion repeats the very same arguments it previously made, except for its argument that because Forest Hills' "direct evidence" in testimony and responses to information requests allegedly did not pertain to the issues it deems most relevant, Forest Hills should be denied the opportunity to cross examine JSEWD's witnesses at hearing. This argument fails for two reasons.

First, in denying JSEWD's motion to reconsider the denial of the certificate of public convenience and necessity JSEWD had requested in Case No. 2012-00470, the Commission held that "Applicants before an administrative agency have the burden of proof."¹ Intervenors, such as Forest Hills, do not. Regardless, Forest Hills filed direct testimony from three persons, including two expert consultants that are widely respected regarding the siting of utility facilities and appraisals in Central Kentucky. JSEWD asked a number of questions in discovery regarding the positions these consultants had taken. Each and every response was answered fully, in contrast to JSEWD's responses to Forest Hills' data requests, despite having been given

¹ Case No. 2012-00470, January 3, 2014 Order.

additional time to respond. In its motion, JSEWD makes a number of statements about what it perceives to be weaknesses in Forest Hills' direct testimony. Instead of adhering to the procedural schedule and filing rebuttal testimony on these issues, JSEWD wrongfully attempts to put evidence in the record regarding Forest Hills' testimony through attorney argument. The Commission ruled against this very practice in Case No. 2012-00470 involving these parties.² JSEWD can elect to file or not file rebuttal testimony based on Forest Hills' direct testimony, but an attorney's opinion regarding the sufficiency of Forest Hills' testimony cannot serve as a basis to avoid hearing on this matter as it is not Forest Hills that carries the burden of proof on any issue. Under JSEWD's theory, the Office of the Attorney General would not be permitted to participate at hearing because it filed no testimony and no information requests. Moreover, JSEWD would have the Commission deny the Commission Staff and the Commissioners themselves the opportunity to question JSEWD about its requested certificate.

Second, as conceded in its motion, JSEWD has filed new information in this proceeding that was not part of the record in Case No. 2012-00470. Forest Hills is not required to file direct testimony on every issue (or any issue, for that matter) for which it seeks to cross examine JSEWD's witnesses at hearing. Based upon the information filed in this proceeding and publicly available information, Forest Hills can identify, however, a number of matters that may be further discussed at hearing. These include, but are not limited to: (1) the Storage Analysis dated March 1, 2014, attached to the 2014 Application; (2) the Population Projections, Jessamine-South Elkhorn Water District, 2015-2050, Appendix A to the Storage Analysis; (3) the failure of JSEWD to consider any additional sites since the issue of the reasonableness of the Switzer Site was raised in 2010; (4) the reasonableness of JSEWD's conduct in dealing with Forest Hills' residents; (5) JSEWD's attempt to sow discord among Forest Hills' residents; (6) JSEWD's lack

² Case No 2012-00470, April 30, 2014 Order.

of candor with the Commission and the parties regarding the status and terms of the legislative grants described in the Application; (7) the prefiled direct testimony of John Horne, Christopher Horne and Dallam Harper; (8) whether the Switzer Site is the least cost option; and (9) other storage alternatives and locations in light of changed circumstances. This list is provided as an example and should not be considered inclusive.

On April 15, 2011, Forest Hills filed a complaint against JSEWD alleging that it had violated KRS 278.280 by virtue of its unreasonable practices in the selection of the Switzer Site for a proposed water tank and the treatment of Forest Hills officers (who are customers of JSEWD).³ The record of that proceeding was incorporated by reference into Case No. 2012-00470.⁴ The following issues were framed in Case No. 2012-00470: (i) whether the proposed tank is needed; (ii) whether the proposed tank is wastefully duplicative; (iii) whether JSEWD considered other storage alternatives; (iv) whether JSEWD failed to perform a reasonable site selection process; (v) whether the Switzer Site is an appropriate site for the proposed tank; (vi) whether JSEWD treated Forest Hills and its officers reasonably. The record in Case No. 2012-00470 was incorporated by reference into this case.⁵ All of these issues still remain to be resolved with respect to the 750,000 gallon tank proposed in this proceeding. The Commission properly determined that a hearing is required in this case and nothing has occurred since that finding to alter it.

While admitting that (1) the Commission did not rule on the siting and valuation issues Forest Hills raised in Case No. 2012-00470 (the Commission did not have to reach that issue since JSEWD failed to prove it needed a 1,000,000 gallon tank) and that (2) Forest Hills' witnesses Clark Toleman and Michael Ritchie updated their testimony in this proceeding

³ Case No. 2011-00138.

⁴ Case No. 2012-00470, Order dated November 15, 2012.

⁵ Order dated March 24, 2014.

regarding those issues, JSEWD nevertheless asks the Commission to “limit or exclude the siting and real estate valuation issues raised by the Association from further examination at such hearing.”⁶ Forest Hills requests only that JSEWD’s witnesses be available for questioning on materials set forth in their application, their responses to discovery requests and the issues raised in this case, which is consistent with every other proceeding before this Commission. While this is JSEWD’s latest effort to stack the deck in its favor at hearing, the water district should be treated the same as any other utility seeking to construct a multimillion dollar facility.

II. JSEWD’s Alternative Motion to Compel Should Be Denied.

If the Commission denies JSEWD’s motion to submit this matter on the record, it alternatively requests that Forest Hills be required to provide additional information in response to information requests Nos. 16 through 19 that JSEWD tendered to Forest Hills. Prior to filing this motion to compel, JSEWD made no attempt to contact Forest Hills, despite Forest Hills’ prior efforts to work with JSEWD on its incomplete discovery responses. Each of these requests would require Forest Hills to “identify with particularity and separately each and every issue or criticism that the Association has identified” for various aspects of JSEWD’s application. As Forest Hills explained in its response to these questions, Forest Hills cannot answer these questions without necessarily invading the work product and mental impressions of the attorneys it employed to represent it in this matter, in addition to divulging privileged communications between the attorneys and Forest Hills.

If Forest Hills is required to identify, in advance of hearing, each and every issue and criticism that it and its attorneys have formed, so that JSEWD can be prepared to respond to those criticisms, the prejudice to Forest Hills is great. This is tantamount to Forest Hills’ attorneys turning over their cross examination outlines. Bluntly, it is not the Commission’s job,

⁶ JSEWD Motion at 8.

the Office of the Attorney General's job, and certainly not Forest Hills' job, to help JSEWD prepare for hearing. Forest Hills has identified several potentially relevant areas above, but disclosure of any additional information would invade Forest Hills' attorney-client privilege. This request is even more incredulous upon review of JSEWD's board minutes, in which it repeatedly discussed this proceeding in closed session.⁷ JSEWD, despite owing a duty of candor to its customers and the Commission, has conducted its decision making in secret, but expects Forest Hills to divulge its strategy, opinions, and mental impressions. JSEWD's request should be denied.

III. The Commission Should Not Grant Additional Time for JSEWD to File Rebuttal Testimony.

If the Commission proceeds with the already-scheduled hearing, JSEWD not only requests the Commission to identify or limit the issues at hearing and require Forest Hills to turn over its cross examination plans, but has also asked for additional time to file rebuttal testimony after having the opportunity to review Forest Hills' work. This request should be denied, as it is the latest example of JSEWD's extreme and dilatory conduct.

In keeping with its practice from Case No. 2012-00470, JSEWD attempted to create a fire drill with respect to the Commission's review of this application by claiming that its grants required fast Commission action, only to then repeatedly ask for extensions that delayed the procedural schedule. This directly contravenes the Commission's September 8, 2014 order in this case that the "Commission does not look favorably upon motions for continuance. Consequently, motions for extensions of time with respect to the schedule herein shall be made in writing and will be granted only upon a showing of good cause." In this proceeding JSEWD failed to correct its deficiencies in the application in a reasonable time period and requested

⁷ Counsel for Forest Hills asked counsel for JSEWD for copies of minutes of the proceedings in closed session and was told there were none. JSEWD declined to state the reason for the discussions in closed session.

additional time to file its responses to information requests. JSEWD now seeks yet a third extension of time that would irrevocably prejudice Forest Hills if granted.

Forest Hills timely filed its responses to JSEWD's information requests on November 26, 2014. Based on the revised procedural schedule JSEWD requested and obtained without objection by Forest Hills, it had until December 15, 2014 – which is nearly three weeks – to file its rebuttal testimony. During this period, JSEWD made no effort to contact Forest Hills with any concerns regarding its answers to information requests. In lieu of filing rebuttal testimony on December 15, 2014, JSEWD instead elected to seek cancellation of the hearing and alternatively, substantive relief with respect to the issues to be presented at hearing so that it can tailor its rebuttal testimony to respond to same.

JSEWD's egregious conduct is evident. Not only is JSEWD again seeking to substantively influence this hearing in a manner that prejudices Forest Hills, but this has the effect of further reducing the amount of time Forest Hills has to prepare for hearing. In the original procedural schedule, JSEWD had to file rebuttal testimony by December 8, 2014, which was 17 days after Forest Hills' information requests would have been due. Despite gaining two additional days to file rebuttal testimony in the revised procedural schedule, JSEWD chose not to file and is instead seeking an indefinite extension to file same pending ruling on the relief it requests in its motion. This not only substantively inures to the benefit of JSEWD, but prejudices Forest Hills' ability to fully prepare for hearing.

JSEWD has presented no good cause for this requested extension. There must be a point when JSEWD is not allowed to further delay this proceeding and that time should be now. JSEWD elected to file this motion on the day its rebuttal testimony was due; it should not be

heard to complain about its own choices. Forest Hills requests that JSEWD not be permitted to file rebuttal testimony since the deadline for doing so has passed.

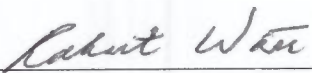
IV. Conclusion

JSEWD seeks unprecedented relief before this Commission in requesting cancellation of the hearing, or in the alternative, various forms of substantive relief that would prejudice Forest Hills' ability to cross examine JSEWD's witnesses. Forest Hills only asks this Commission to affirm the normal practices that govern its proceedings. For these reasons, Forest Hills Residents' Association, Inc. respectfully requests the Commission to deny Jessamine-South Elkhorn Water District's motion in its entirety.

Dated: December 18, 2014

Respectfully submitted,

Robert M. Watt, III
Monica H. Braun
Stoll Keenon Ogden, PLLC
300 West Vine Street, Suite 2100
Lexington, Kentucky 40507
859-231-3000
robert.watt@skofirm.com
monica.braun@skofirm.com

By 

*Counsel for Forest Hills Residents'
Association, Inc.*


Certificate of Service

This is to certify that the foregoing pleading has been served by mailing a copy of same, postage prepaid, to the following person on this 18th day December 2014:

Bruce E. Smith, Esq.
Henry E. Smith, Esq.
Bruce E. Smith Law Offices, PLLC
201 South Main Street
Nicholasville, KY 40356

Jennifer Black Hans, Esq.
Gregory Dutton, Esq.
Assistant Attorneys General
1024 Capital Center Drive, Suite 200
Frankfort, KY 40601

Anthony G. Martin, Esq.
P.O. Box 1812
Lexington, KY 40588



*Counsel for Forest Hills Residents'
Association, Inc.*

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