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April 8, 2015

HAND DELIVERED

Jeff Derouen
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, KY 40601

RECEIVED

APR 08 2015

PUBLIC SERVICE
COMMISSION

RE: *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*

Dear Mr. Derouen:

Enclosed please find and accept for filing the original and ten copies of Forest Hills Residents' Association, Inc.'s Post-Hearing Brief in the above-captioned matter.

Please acknowledge receipt of this filing by placing the stamp of your Office with the date received on the enclosed additional copy and return it to me. Should you have any questions please contact me at your convenience.

Sincerely,

Stoll Keenon Ogden PLLC

Monica H. Braun

Enclosure

cc: Counsel of Record (w/encl.)

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APR 08 2015

PUBLIC SERVICE
COMMISSION

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF JESSAMINE-SOUTH)
ELKHORN WATER DISTRICT FOR A)
CERTIFICATE OF PUBLIC)
CONVENIENCE AND NECESSITY TO) CASE NO. 2014-00084
CONSTRUCT AND FINANCE A)
WATERWORKS IMPROVEMENT)
PROJECT PURSUANT TO KRS 278.020)
AND 278.300)

FOREST HILLS RESIDENTS' ASSOCIATION, INC.'S

POST-HEARING BRIEF

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I. INTRODUCTION

Jessamine South-Elkhorn Water District's ("Water District") request for a certificate of public convenience and necessity ("CPCN") to build a 750,000 gallon (or alternatively a 500,000 gallon) elevated storage tank should be denied. The Water District is willing to forego a potential second source of supply and the safety and property values of its customers to defend a tank site that it openly acknowledges is not the only site on which the tank could be located. The Water District's actions, combined with (1) flawed demand values; (2) miscalculated population projections; (3) incomplete hydraulic analyses that have not been calibrated, (4) a failure to advertise bids; (5) years of expenditures that have soared beyond \$1 million in the absence of a CPCN; and (6) unreasonable treatment of its customers in the Forest Hills Residents' Association, Inc. ("Intervenors"), could serve as a master class in poor utility planning. The Commission cannot grant the CPCN the Water District has requested without deviating from longstanding Commission precedent regarding these deficiencies. Accordingly, and for all the reasons set forth below, the Commission should deny the Water District's requested CPCN and enter an order finding the Water District's services and practices with respect to the Intervenors unreasonable and that the proposed site is an unreasonable location for any water tank.

II. PROCEDURAL HISTORY AND BACKGROUND

The Water District selected the one-acre site on which it proposes to construct a 750,000 gallon elevated storage tank ("Switzer site") in 2003 and purchased it in 2004.¹ After the purchase, the area immediately adjacent to the Switzer site was developed into a residential subdivision, known as Forest Hills Estates ("Forest Hills")² Presently, there are over twenty-

¹ See Water District's Application, Exhibit A at unnumbered first page

² See Case No. 2011-00138, Water District's Answer at p. 3

five homes in the subdivision.³ In the spring of 2010, Forest Hills residents learned that the Water District planned to construct a one million gallon tank on the site, which is at the end of Chinkapin Drive in Forest Hills, after the Water District placed piping on the lot.⁴

Because of the close proximity of the proposed tank to their homes, Forest Hills representatives began attending the monthly meetings of the Water District's Board of Commissioners ("Board") to demonstrate to the Water District that the Switzer site was an unacceptable location for the tank.⁵ Over the next year, Forest Hills proposed two alternate sites to the Water District, each of which was rejected.⁶ The Water District stressed throughout the process that Forest Hills would be required to pay for the costs associated with "relocating" the not-yet-built tank, which, based upon the Water District's calculations, would exceed \$279,000 for one of the alternative sites.⁷

Forest Hills continued its efforts to work with the Water District until it received a contract in March 2011 from the Water District's counsel containing onerous requirements, including posting a \$250,000 irrevocable letter of credit within twelve days in the Water District's name, in order for the Water District to consider utilizing an alternate site.⁸ Following receipt of the letter, the Intervenor filed a complaint against the Water District on April 15, 2011 at the Commission because of the Water District's unreasonable conduct.⁹

The Water District filed an application requesting a CPCN on October 16, 2012. That proceeding, which was Case No. 2012-00470, culminated in a two-day hearing on March 13 and 14, 2013. On April 30, 2013, the Commission denied the Water District's requested CPCN

³ Pre-filed Testimony of E. Clark Toleman

⁴ See Case No. 2011-00138, Complaint at ¶4, 3/14/13 Hearing Transcript at 10:37:10-10:37:53

⁵ 3/14/13 Hearing Transcript at 10:37:53-10:38:22

⁶ See generally the direct testimony of William Bates and T. Logan Davis at hearing on 3/14/13

⁷ 3/14/13 Hearing Transcript at 10:44:50-10:45:12

⁸ See Exhibit JSEWD-Strong 4

⁹ See generally Case No. 2011-00138, Complaint

because the Water District failed to demonstrate it needed a million additional gallons of storage capacity¹⁰ Because there was no need for the proposed facility, the Commission did not address the questions related to the selection of the site or the Water District's treatment of the Intervenor¹¹ The Water District moved for rehearing; that motion was denied on January 3, 2014.

On March 7, 2014, the Water District filed an application requesting a CPCN for a 750,000 gallon elevated water tank on the Switzer site, or alternatively approval of a 500,000 gallon tank at that location.¹² At the Water District's behest, the records of the prior CPCN case (Case No. 2012-00470) and the complaint proceeding the Intervenor¹³ filed against the Water District (Case No. 2011-00138) were incorporated in the record¹³ Despite moving to incorporate these cases into the instant proceeding, the Water District opposed the Intervenor's intervention. The Commission granted the Intervenor's motion.¹⁴ The Attorney General was likewise permitted to intervene.¹⁵

In its application, the Water District requested that the Commission rule on the CPCN in less than three months, and simultaneously sought deviations from filing information that is fundamental to the review of a CPCN, such as plans and specifications, financing information; and copies of permits¹⁶ The Commission denied the Water District's request for a deviation.¹⁷ After more than two months had elapsed without the Water District curing these deficiencies, the Commission ordered the Water District to file a report explaining in detail the status of its efforts

¹⁰ Case No. 2012-00470 Order, April 30, 2013 at 1

¹¹ Id. at 12, n. 42

¹² See Water District's Application

¹³ Order, March 25, 2014

¹⁴ Order, April 16, 2014 The Commission denied T Logan' Davis's motion to intervene, but noted that Mr Davis was free to participate on behalf of the Intervenor¹⁵

¹⁵ Order, March 25, 2014

¹⁶ Water District's Application and Cover Letter

¹⁷ Order, March 25, 2014

to cure the deficiencies.¹⁸ The Water District did not cure its deficiencies until August 21, 2014, which was nearly three months *after* the date by which it requested the Commission rule on the application.

Following discovery, a hearing occurred on February 10 and 11, 2015, with Nick Strong; John Horne; Christopher Horne; William Berkley; and Dallam Harper, Jr. testifying on behalf of the Water District and T Logan Davis; Clark Toleman; and Michael Ritchie testifying for the intervenors. The Attorney General did not call any witnesses. This brief is filed pursuant to the schedule established at the conclusion of the hearing.

III. ARGUMENT

A. The Legal Standard for Issuance of a CPCN.

The Water District cannot commence construction of the proposed water tank without a CPCN from the Commission because KRS 278.020(1) requires that

No person, partnership, public or private corporation, or any combination thereof shall begin the construction of any plant, equipment, property or facility for furnishing to the public any of the services enumerated in KRS 278.010...until that person has obtained from the Public Service Commission a certificate that public convenience and necessity require the service or construction..

Pursuant to KRS 278.015, the Water District is subject to the Commission's jurisdiction in the same manner as any other utility.

The Kentucky Court of Appeals, then the state's highest court, has construed "public convenience and necessity" to require the utility to prove: (1) there is a need for the proposed facility or service; and (2) the new facility will not create wasteful duplication.¹⁹ "Need" requires the utility to demonstrate "a substantial inadequacy of existing service" due to a

¹⁸ Order, June 5, 2014

¹⁹ Kentucky Utilities Co. v. Public Service Commission, 252 S W 2d 885, 890 (Ky 1952)

deficiency of service facilities beyond what could be supplied by normal improvements in the ordinary course of business²⁰ Preventing “wasteful duplication” means not only preventing a physical multiplicity of facilities, but avoiding “excessive investment in relation to productivity or efficiency.”²¹ As set forth below, the Water District has not satisfied either component of “public convenience and necessity” and its application for a CPCN should therefore be denied.

B. The Proposed Water Tank Is Not Needed.

i. The Water District’s Storage Calculations Greatly Overstate Its Storage Needs

No calculation is more fundamental to assessing the need for additional storage capacity than a water utility’s average daily demand. In Case No. 2012-00470, the Commission denied the requested CPCN because the Water District could not demonstrate, based upon its average daily demand, that an additional one million gallons of storage was needed.²² In this case, the Water District based its average daily demand calculation, Storage Analysis, hydraulic analysis, and population projections on calendar year 2010 data.²³ The Water District used this five-year old data (despite having more current demand information) because 2010 is the most recent year the Water District has actual census data.²⁴

The Water District submitted a Storage Analysis with its Application prepared by its engineers that purports to prove that 750,000 gallons of additional storage is necessary. The Storage Analysis utilizes 743,659 gallons as the Water District’s average daily demand in 2010. This figure is incorrect because in the Final Order in Case No. 2012-00470 the Commission found that the Water District’s average daily demand in 2010 was 619,353 gallons.²⁵ The 2010

²⁰ Id.

²¹ Id.

²² Case No. 2012-00470 Order, April 30, 2013 at 13

²³ See Storage Analysis attached to the Water District’s Application

²⁴ Id.

²⁵ Case No. 2012-00470 Order, April 30, 2013 at 8

00470 but had no explanation as to why.²⁷ He could not conclusively state from whom he even got the 743,659 gallons figure.²⁸ Similarly, Mr. Chris Horne, who also performed engineering services for the Water District regarding the proposed tank, likewise denied selecting 743,659 gallons as the average daily demand and was unsure if the Water District based the figure on meter readings or telemetry.²⁹ In short, neither engineer who created the Storage Analysis could explain how their average daily demand was calculated or even from whom they obtained the information. Mr. Nick Strong, who is Chairman of the Water District's Board, was likewise unclear. Despite being listed as the responsible witness for the data request regarding the Water District's average daily use, Mr. Strong "couldn't tell you" if the information he provided was accurate.³⁰ There is therefore no proof in the record - in discovery, from the hearing, or otherwise - that supports the 743,659 gallons figure on which the Storage Analysis is based. Use of this figure is therefore not credible. The impact of this error on the reliability of the Storage Analysis is significant, as it overstates usage by **20%**.

In addition to overstating average daily demand by over 124,000 gallons, the storage analysis further inflated the Water District's claimed storage needs for (1) equalization storage, (2) fire storage, and (3) emergency storage, which the Water District claims comprises the storage requirement of a distribution system.³¹ With respect to equalization storage, which the Water District states is the volume of water required to allow the system to operate with a supply of an average demand for the maximum day, the Water District selected 30% of its maximum day usage as the appropriate calculation. In contrast, a storage capacity analysis performed by Kentucky-American Water Company that the Water District moved for incorporation into this

²⁷ 2/10/15 Hearing Transcript at 13 48 00-13 51 19

²⁸ Id.

²⁹ Id. at 16 04-16 05 33

³⁰ 2/11/15 Hearing Transcript at 10 12 00-10 12 49

³¹ See Storage Analysis attached to the Water District's Application at 22

case utilized 12% to 15% of its maximum day usage to calculate equalization storage.³² Several of the authorities cited by the Water District demonstrate that the 30% factor is unreasonably high: “[t]ypically the equalization storage requirement is between 15% and 30%” of the maximum day usage and “...equalization storage could exceed 30% for small service areas or arid climates ”³³ Had the Water District used a more moderate equalization storage factor, such as 15% or even 20%, the equalization storage requirement drops from 535,275 gallons to 267,638 gallons or 356,850 gallons

The Water District’s fire storage calculation is equally inflated. As an initial matter, the Water District’s tariff clearly states it does not intend to provide fire protection. “The District’s system is not designed nor intended for use for fire protection in any manner whatsoever.”³⁴ Likewise, in Case No 2012-00470, the Water District made no claim that it needed storage to provide fire protection. In fact, the Water District only mentioned utilizing water storage for fire protection after the Commission noted in its Final Order in Case No. 2012-00470 that the 1,000,000 gallon tank “may still be necessary to address reasonably expected growth or to provide for enhanced services such as fire protection and, therefore, would not constitute excessive investment,” but the Water District had failed to prove it.³⁵ The Water District does not explain (1) when it decided to provide fire protection; (2) the steps it is taking to implement this change, or (3) when it plans to revise its tariff. The Board minutes produced by the Water District do not mention this change. Nevertheless, the Storage Analysis states that the needed fire storage is 540,000 gallons. Currently, there is 550,000 gallons of water storage in the

³² The Water District referred to Kentucky-American Water Company’s Storage Capacity Analysis in the Exhibits to its Application. According to the Water District, the Storage Capacity Analysis was filed with the Commission in Case No 2005-00039, and a similar study was referred to in Case No 2005-00546

³³ See Storage Analysis attached to the Water District’s Application at 24-25

³⁴ Water District’s Tariff at Original Sheet No 13 (emphasis in original)

³⁵ Case No 2012-00470 Order, April 30, 2013 at 11

Northwest service area where the tank is proposed to be located. It is facially unreasonable for the Water District to claim that it needs 540,000 additional gallons of storage for fire protection that it expressly disclaims providing to its customers.

The third storage component according to the Water District is emergency storage. Claiming there is no formula for calculating the necessary amount of emergency storage, the Water District, based solely upon the unsupported opinion of its engineers, decided that 25% of the inflated 2010 average daily demand figure was required.³⁶ By inflating the 2010 average daily demand and each of the three components that the Water District claims comprise storage in a distribution system, the Water District claims it needs the following:

| Storage Component | Gallons of Storage Required |
|--------------------------|------------------------------------|
| Equalization Storage | 535,275 gallons |
| Fire Protection | 540,000 gallons |
| Emergency Storage | 185,915 gallons |
| Total | 1,261,190 gallons |

Adjusting these figures to accurate and reasonable levels, however, demonstrates that the Water District's storage needs are significantly lower than it claims:

| Storage Component | Intervenors' Adjustment | Gallons of Storage Required |
|--------------------------|---|------------------------------------|
| Equalization Storage | Reduced to apply 15% factor to maximum day demand | 267,638 gallons |
| Fire Protection | Although could be reduced to zero because tariff expressly disclaims providing fire protection, reduced based on average of required fire flows | 261,230 gallons |

³⁶ See Storage Analysis attached to the Water District's Application at 24-25

| | | |
|-------------------|--|------------------------|
| | in Storage Analysis | |
| Emergency Storage | Reduced to apply 25% factor to correct 2010 average day demand | 154,838 gallons |
| Total | | 683,706 gallons |

By making these reasonable adjustments – which still permit the Water District to have fire protection storage and utilizes the Water District’s 25% emergency storage factor – the storage needs exceed the existing 550,000 gallons of storage by merely 133,706 gallons, which is markedly less than the 750,000 gallon tank (or the alternative 500,000 gallon tank) the Water District proposes to construct. The 133,706 gallons deficiency is very similar to the 159,200 gallons deficiency the Commission found in Case No 2012-00470.³⁷

ii. The Water District’s Population Projections Are Flawed and Confusing

In Case No. 2012-00470, the Commission found the Water District’s evidence regarding anticipated system growth to be inadequate.³⁸ In this case, the Water District engaged Mr. Dallam Harper, Jr. to prepare a population study that attempts to project population growth for the Water District’s service territory. The Water District then used these projections to calculate the projected average daily demand through 2040. The Water District used calendar year 2010 as the starting point for the projections, with usage based entirely on the flawed 743,659 gallons average daily demand figure³⁹. The Water District took that demand figure and divided it by the population in the service territory in 2010 to calculate an average daily demand per capita of 121.9 gallons.⁴⁰ The Water District used the 121.9 gallons per capita to project average daily

³⁷ Case No 2012-00470, Order, April 30, 2013 at 5

³⁸ Id. at 11

³⁹ See Storage Analysis attached to the Water District’s Application at 32

⁴⁰ Id.

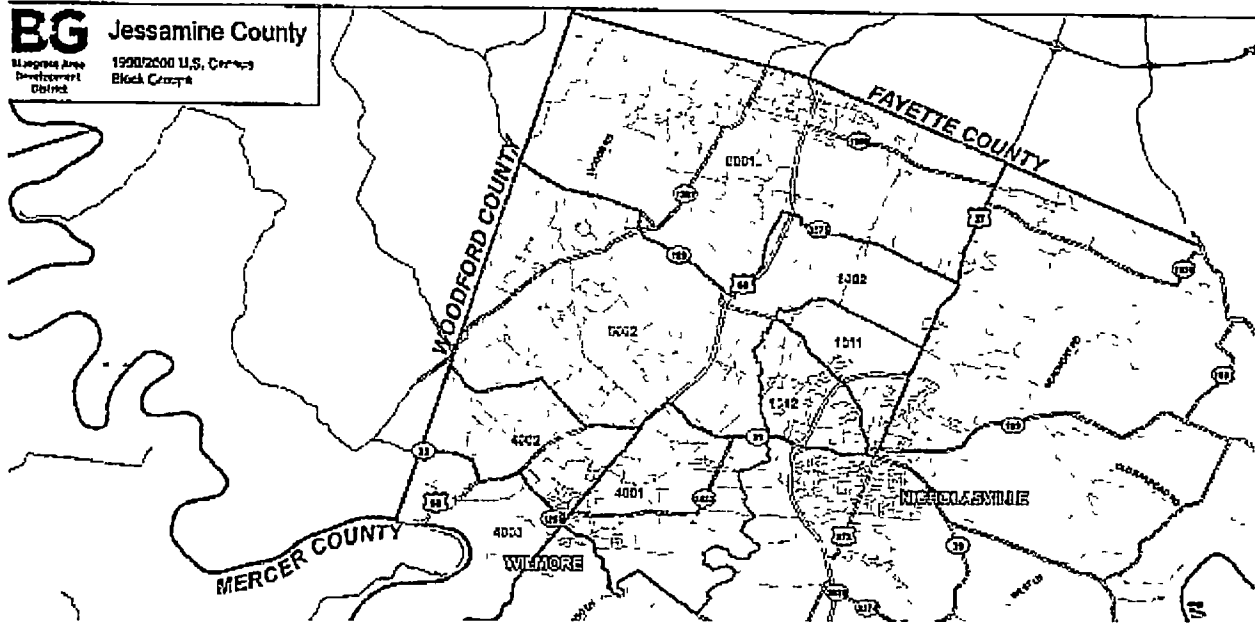
demands in 2020, 2025, and 2040.⁴¹ Had the Water District used the correct average daily demand figure, which is 619,353 gallons, the purported storage deficit declines markedly because the average daily demand per capita is reduced from 121.9 gallons to 101.5 gallons. Even if Mr. Harper's population projections were true (but the Intervenors believe they are not) use of the correct average daily demand shows that even in year 2040, the Water District would still have *100,000 gallons* of excess storage capacity if the tank proposed in this proceeding is constructed.

| <u>Year</u> | <u>Population</u> | <u>ADD per capita</u> | <u>ADD Total</u> | <u>Storage Deficit</u> |
|-------------|-------------------|-----------------------|-------------------|------------------------|
| 2040 | 11,825 | 101.5 gallons | 1,200,238 gallons | 650,238 gallons |

If the Water District will not utilize 100,000 of the 750,000 gallons of storage even after 25 years under Mr. Harper's highly aggressive population projections, the facility the Water District has proposed is simply not needed.

In addition to utilizing incorrect average demand, the results of Mr. Harper's population projections are not credible. Mr. Harper's approach was to overlay the Water District's service territory onto population blocks used by the United States government in reporting census data in 2000 and 2010. By comparing the population growth in these blocks as reported in the census results, Mr. Harper endeavored to project residential growth in the Water District's service territory. The results, however, are facially unreasonable. In certain of the census blocks only a portion fell within the Water District's service territory. The Water District's service territory is shaded below.

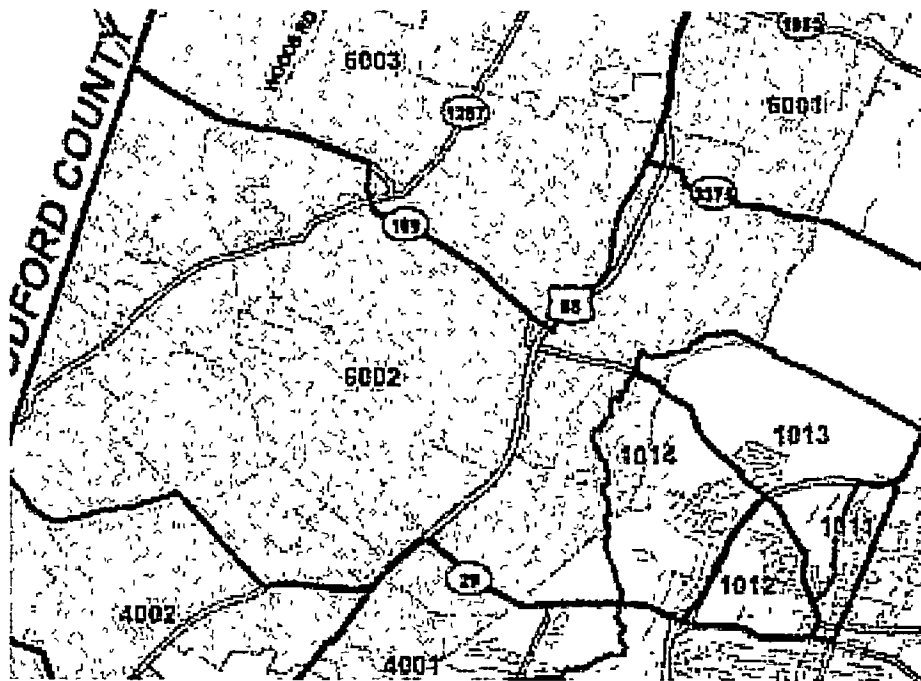
⁴¹ Id.



Neither Mr Harper’s pre-filed testimony nor his work papers explained or demonstrated how growth was allocated in the blocks that are only partially served by the Water District. During the hearing, Mr Harper conceded that he did not perform any of these calculations, stating that the projections were performed by the GIS department at his prior employer, Bluegrass Area Development District⁴² Mr Harper did not inform the Commission or the parties that his employment with Bluegrass Area Development District ceased shortly after his pre-filed testimony was completed until the hearing in this proceeding, despite responding to data requests that sought his work papers for calculations he knew he did not perform. Mr. Harper stated that the GIS department allocated growth within these blocks based on surface area.⁴³ If the GIS department did in fact allocate growth based on surface area, then the calculations were clearly performed incorrectly For example, census block group 6002 is entirely in the Water District’s service area and, according to Mr Harper’s report, contains 1,991 people in 2010.

⁴² 2/10/15 Hearing Transcript at 12 02 30-12 03 20

⁴³ 2/10/15 Hearing Transcript at 12 02 30-12 03 05



In contrast, only a small sliver of census block group 1013 is in the Water District's service area and no part of census block group 1011 is within the Water District's service area, yet Mr. Harper's report allocates 3,144 persons to the Water District in these two block groups. If the allocation was indeed based on surface area as Mr. Harper claims, then these results are clearly erroneous. Mr. Harper offered no other explanation for these anomalous results. Because Mr. Harper cannot explain, with any degree of certainty, how population totals were allocated to the Water District, the results simply are not credible.

In an effort to understand how Mr. Harper calculated the population of the Water District at the intervals in his study, the Intervenor asked him to produce after the hearing his work papers, calculations and source documents for the maps in his report where the populations of portions of the Water District are set forth for the years 1990, 2000 and 2010.⁴⁴ The response to the post-hearing data request defies comprehension. First, he correlates population with acreage

⁴⁴ Water District's Response to Dallam Harper, Jr Hearing Data Request

although he offers no basis for this correlation.⁴⁵ Second, he says that the census block groups shown on the maps were not used to calculate population, census blocks were used to calculate population.⁴⁶ Nevertheless, all subsequent references to census information in the response refers to census block groups, not census blocks.⁴⁷ Third, he acknowledged an error in his hearing testimony.⁴⁸ At the hearing he said that the population numbers shown on the maps within each block group were the population totals for the portions of the block groups within the Water District's service area.⁴⁹ In the post-hearing data request response, he said that the population numbers on the maps were the total population within each block group.⁵⁰ He went on to say that these block group totals were not used in the calculation of the population of the Water District.⁵¹ Fourth, he concluded by contradicting the previous statement and asserted that the population numbers on the maps correctly state the population of the Water District and were the only numbers used to generate his future population projections.⁵² An examination of the spreadsheets attached to the response reveals no relationship whatsoever between the spreadsheets and the information on the maps in Mr. Harper's report. For example, the map in the report indicates that the 2010 population within block group 6001 is 3,657, yet, the only reference to block group 6001 in the spreadsheets indicates that 278 persons in block group 6001 are in the Water District's service area.

Once the GIS department completed allocating portions of the census blocks, Mr. Harper then applied a percentage growth factor to project growth in the Water District from 2015 to 2050. Mr. Harper explained during the hearing that based on the population growth he observed

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ Id.

⁴⁸ Id.

⁴⁹ Id.

⁵⁰ Id.

⁵¹ Id.

⁵² Id.

in Jessamine County from 1990 to 2010, he could have utilized either a (1) 9.04%, (2) 14.38%; or (3) 19.26% growth share factor.⁵³ Consistent with Messrs. Horne's approach in the storage analysis, Mr Harper inflated his population projections by selecting the highest available growth value, while readily conceding the 19.26% growth was experienced during the real estate bubble.⁵⁴

The unreasonableness of the 19.26% growth share is evidenced by the unrealistic results it produced. For example, Mr. Harper claims that the Water District will experience growth of 32.63% from 2015 to 2020. A simple metric (that does not involve a multistep overlay of census blocks with uncertain allocations) is to compare the actual number of customers the Water District has had in recent years. For the most recent five years of available data, which is 2009 to 2014, the Water District experienced growth of 11.25% in the Northwest service territory.⁵⁵ Nothing in Mr. Harper's short pre-filed testimony, documents produced in discovery, or his testimony at the hearing gives any credible explanation of why the Water District's growth in the next five years will triple from the growth experienced in the last five years.

The Water District's claimed storage deficit is like a house built on sinking sand; the foundation cannot support it. The Water District (1) used the wrong average daily demand; (2) could not explain where its demand figure came from, (3) inflated each and every subjective storage need, including those inconsistent with its tariff; and (4) relied on population projections that are confusing and facially unreasonable. The Water District's request for a CPCN should be denied.

⁵³ See Population Projections Jessamine County South Elkhorn Water District 2015-2050 attached to the Water District's Application at 5, 2/10/15 Hearing Transcript at 12 11 18-12 13 00

⁵⁴ Id.

⁵⁵ Water District's Response to Intervenors' Information Request No. 17

C. The Water District's Hydraulic Analysis Is Unreliable and Incomplete

i. The Computer Model Has Not Been Calibrated

Water utilities prove the feasibility of proposed projects through hydraulic analyses. The Commission has recognized that a properly constructed hydraulic analysis creates a computer model of the system that mirrors the actual operation of the system - the operation of the pumping stations, the emptying and filling of the storage tanks, and the flow of water as it passes through various points within the distribution system⁵⁶ Using such a model, proposed design changes can be added and their effect evaluated⁵⁷ The Water District's hydraulic analysis in Case No. 2012-00470 revealed a number of critical deficiencies regarding the effect the tank proposed in that proceeding would have had on the operation of the Water District's system. For example, the hydraulic analysis revealed that the proposed tank would, at most, be 58% full over the 72-hour period the analysis was conducted and the Water District's existing 50,000 gallon tank would have been completely empty approximately 75% of the time.

The hydraulic analysis that was submitted with the Water District's application in this proceeding is unreliable and incomplete. Based on prior Commission orders, the Water District's requested CPCN must be denied because the hydraulic analysis does not demonstrate the feasibility of the proposed project. Mr. Chris Horne, who performed the hydraulic analysis, testified during the hearing that he could not recall the last time he had calibrated the KY Pipe computer model.⁵⁸ It was revealed in the Water District's post-hearing data request responses

⁵⁶ *In the Matter of The Application of Hardin County Water District No 1, a Water District Organized Pursuant to Chapter 74 of the Kentucky Revised Statutes, in Hardin County, Kentucky for (1) a Certificate of Public Convenience and Necessity Authorizing and Permitting Said Water District to Construct Water Storage and Distribution System Improvements, Consisting of Elevated Storage Tanks, and Water Transmission Lines (the Project), (2) Approval of the Proposed Plan of Financing, and (3) Approval of Increased Water Rates Proposed by the District to be Charged to Its Retail and Wholesale Customers* (Case No 101089) Order, May 15, 1989

⁵⁷ Id

⁵⁸ 2/10/15 Hearing Transcript at 17 20 24-17 20 35

that the model has not been calibrated since October 2011.⁵⁹ Failing to calibrate the model renders the hydraulic analysis unreliable, as repeatedly recognized by this Commission:

- “The Commission’s review of the hydraulic analyses indicates that they are unreliable. To ensure the accuracy and reliability of a hydraulic analysis, the model’s results are matched, or ‘calibrated,’ against actual field data. Since a computer model is only as good as its assumptions, ***the calibration process is necessary to ensure that the model depicts, as closely as possible, the distribution system’s actual operations.*** Neither analysis presented by Hardin County No. 1 is calibrated.... Given the glaring deficiencies in both analyses, the Commission believes that neither can be used to support a finding that the proposed construction project is feasible... ***Any subsequent application which fails to include a calibrated hydraulic analysis, however, will meet the same fate as the present application.***”⁶⁰
- “In order to obtain realistic results when utilizing computer hydraulic analyses to predict a water distribution system’s performance, ***engineering references stress the importance of calibrating the results predicted to actual hydraulic conditions.*** This calibration process should include matching field measurements to the results predicted by the computer over a wide range of actual operating conditions.”⁶¹
- “Computer hydraulic analyses can be a very reliable method for depicting the operation of a water distribution system. ***However, in order to have confidence in the results of a computer hydraulic analysis, the computer model must first be calibrated to match field conditions.***”⁶²
- “When the initial review of the hydraulic information was completed, the engineering staff had some questions concerning model calibration... However, in my opinion the customer demands utilized in the computer hydraulic analyses for both average and peak conditions are too low, ***the computer model could have been calibrated more closely, a better tank location could have been selected*** and the potential low and high pressure locations need to be addressed. Southern

⁵⁹ See Water District’s Response to C. Horne Hearing Requests at page 11 of 15

⁶⁰ *In the Matter of The Application of Hardin County Water District No. 1, a Water District Organized Pursuant to Chapter 74 of the Kentucky Revised Statutes, in Hardin County, Kentucky for (1) a Certificate of Public Convenience and Necessity Authorizing and Permitting Said Water District to Construct Water Storage and Distribution System Improvements, Consisting of Elevated Storage Tanks, and Water Transmission Lines (the Project), (2) Approval of the Proposed Plan of Financing, and (3) Approval of Increased Water Rates Proposed by the District to be Charged to Its Retail and Wholesale Customers* (Case No. 101089) Order, May 15, 1989 (emphasis added)

⁶¹ *In the Matter of The Application of Crittenden-Livingston County Water District, of Crittenden and Livingston Counties, Kentucky, for Approval of Construction of Phase II Project of District, Including Financing and Increased Rates* (Case No. 10285) Data Request Order, June 29, 1988 (emphasis added)

⁶² *In the Matter of The Application of Wood Creek Water District, of Laurel County, Kentucky, for Approval of Construction, Financing and Increased Water Rates* (Case No. 9594) Order, November 26, 1986, at Staff Report attached thereto (emphasis added)

Madison's request for a certificate of public convenience and necessity should be denied unless the low and high pressure areas are adequately addressed."⁶³

The Water District admits that it has not calibrated the computer model for several years prior to performing the hydraulic analysis that purports to demonstrate the feasibility of the proposed project with regard to engineering and water quality. The unreliability of the hydraulic analysis is further exacerbated by the fact that the Water District has modified its distribution system in anticipation of the proposed tank – such as upsizing the Catnip Hill Pike and Rhineheimer distribution lines – as recently as 2014.⁶⁴ The Water District has thus placed additional infrastructure into its system that directly bears on the operation of this major project but has made no attempt to calibrate the model to determine if the modeled results in any way match actual field conditions. Allowing utilities to construct major projects, such as this one, without satisfying basic standards of engineering reliability could create adverse precedent. The Commission's prior rulings are clear that an uncalibrated model, as this one admittedly is, warrants denial of the requested CPCN

ii. No Hydraulic Analysis Has Been Filed Demonstrating that a "Catastrophic" Outcome Will Not Occur

The Water District is in negotiations with the City of Nicholasville to interconnect the two systems, which would provide the Water District a second source of supply. The Commission has previously looked favorably upon water utilities obtaining additional sources of

⁶³ *In the Matter of The Application of the Southern Madison Water District, a Water District Organized Pursuant to Chapter 74 of the Kentucky Revised Statutes, of Madison County, Kentucky for (I) Approval of the Adjustment of Water Rates Proposed to Be Charged by the District to Customers of the District, (II) A Certificate of Public Convenience and Necessity, Authorizing and Permitting Said Water District to Construct an Extension to Its Waterworks Distribution System, and (III) Approval of the Proposed Plan of Financing of Said Improvements and Extension of Said Waterworks Distribution System (Case No 9596) Order, June 6, 1986, at Staff Report attached thereto (emphasis added)*

⁶⁴ See Water District's Responses to J Home Hearing Request at page 6 of 15

supply.⁶⁵ In December 2013, months before this application was filed, engineers working on behalf of the City of Nicholasville requested a copy of the Water District's modeling files because "part of this project includes hydraulic feasibility evaluation of the interconnect using the existing models of the two systems."⁶⁶ On May 2, 2014, which was roughly two months after the Water District's request for a CPCN was filed, Mr John Horne submitted a memorandum to the Water District's Board of Commissioners stating that:

We are in the final design of the proposed 750,000 gallon elevated storage tank, and one phase of the design requires a 72-hour hydraulic simulation to demonstrate that the design is workable and acceptable

I believe *it is mandatory that we consider the relevancy and impact that the proposed [City of Nicholasville] Interconnect* would have on this simulation, if it occurs. Insofar as Kentucky American Water Company and City of Nicholasville operate in two (2) distinct and completely separate hydraulic gradients, *the impact on the District's system could be catastrophic.*⁶⁷

To date, the Water District has not submitted a hydraulic analysis that simulates whether an interconnect with the City of Nicholasville will be "acceptable" or "catastrophic" with respect to the 750,000 gallon tank for which the Water District has requested a CPCN. Even more concerning – despite describing the potential impact as "catastrophic" nearly a year ago – Mr Chris Horne testified during the hearing that only a "preliminary" investigation had been made into the feasibility of the interconnect if the tank proposed in this proceeding is constructed, describing it as "not finished" and "not complete."⁶⁸ He could not answer with

⁶⁵ *In the Matter of The Application of Fleming County Water Association, Inc of Flemingsburg, KY for (1) a Certificate of Public Convenience and Necessity (2) Approval of the Proposed Plan of Financing Said Project* (Case No 2004-00280) Order, Aug, 24, 2004, *In the Matter of An Investigation of Boone County Water District's Decision to Change Water Suppliers and of the Amendment of Water Supply Agreements between Northern Kentucky Water Service District and Boone County Water District and the City of Florence, Kentucky* (Case No 2000-00206) Order, Nov 9, 2000

⁶⁶ See Forest Hills Hearing Exhibit 11 at December 13, 2013 Letter from Hazen and Sawyer

⁶⁷ *Id.* at May 2, 2014 Memorandum from John Horne to Water District Board of Commissioners (emphasis added)

⁶⁸ 2/10/15 Hearing Transcript at 16 35 44-16 37 18

certainty when he even obtained a copy of the City of Nicholasville's modeling files that are necessary to the analysis.⁶⁹ Surely the Commission will not permit the Water District to construct a tank that could result in a "catastrophic" outcome when the very engineers who sounded the alarm regarding the problem did nothing to demonstrate to the Water District or the Commission that the project was feasible.

When pushed at the hearing on what the Water District would do if the tank was constructed and the Nicholasville interconnect was deemed not feasible from a hydraulic perspective, Mr. Chris Horne testified that the Water District would forego the interconnect.⁷⁰ This is yet another example of the Water District's imprudent and unreasonable conduct; it would sacrifice emergency and redundant supply in defense of a tank site that it freely admits is not the only site on which tank the could be constructed⁷¹ It is inconsistent for the Water District to claim its needs nearly 200,000 gallons of emergency storage, but place more importance on defending the Switzer site than obtaining emergency supply. Moreover, it is equally imprudent and unreasonable to request a CPCN without determining whether the interconnect is hydraulically feasible if the tank is constructed. If the Water District is granted the CPCN it has requested, the Commission will have (1) no evidence that the tank is hydraulically feasible with respect to the interconnect, and (2) no assurance that the Water District will not deprive its customers of emergency supply when the Water District had nearly a year to complete this investigation and present its findings to the Commission. The Water District's request for a CPCN should be denied.

⁶⁹ 2/10/15 Hearing Transcript at 16 35 00-16 35 44

⁷⁰ 2/10/15 Hearing Transcript at 16 38 00-16 38 40

⁷¹ 2/10/15 Hearing Transcript at 14 04 39 -14 05 03, 2/10/15 Hearing Transcript at 14 05 16 -14 05 26

D. The Proposed Tank Is Wastefully Duplicative

i. The Water District Has Not Complied with KRS 424.260

Even if the Water District could establish that it needed an additional 750,000 gallons of water storage, it bears the burden of proving that the proposed tank will not create wasteful duplication.⁷² In assessing whether the proposed tank will create duplication, the Commission must look at whether the Water District has proven that its proposal is the least-cost alternative.⁷³ Relatedly, when a utility, such as the Water District in this proceeding, seeks approval of financing arrangements pursuant to KRS 278.300(3) for a proposed project, the Commission must determine whether the financing “is necessary or appropriate for or consistent with the proper performance by the utility.” If a utility cannot demonstrate, to a reasonable degree of certainty, the expected cost of the proposed construction, the Commission cannot determine if it will create wasteful duplication; is the least cost option; or is a necessary or appropriate action.

Mr. Strong testified at hearing that the Water District has not begun the bidding process for the tank it is proposing, as bids have not even been advertised for the \$2,000,000 project.⁷⁴ The Intervenors have inquired throughout this case when such bidding would occur. By statute and as enforced by the Commission, a CPCN cannot be granted to a water district until compliance with KRS 424.260 has been proven to the Commission. The statute states that:

Except where a statute specifically fixes a larger sum as the minimum for a requirement of advertisement for bids, no city, county, or district, or board or commission of a city or county, or sheriff or county clerk, may make a contract, lease, or other agreement for materials, supplies except perishable meat, fish, and vegetables, equipment, or for contractual services other than professional, involving an expenditure of more than twenty

⁷² *Kentucky Utilities Co v Public Service Commission*, 252 S W 2d 885, 890 (Ky 1952)

⁷³ *In the Matter of Application of Kentucky Power Company for a Certificate of Public Convenience and Necessity Authorizing the Company to Convert Big Sandy Unit 1 to a Natural Gas-Fired Unit and for All Other Required Approvals and Relief* (Case No 2013-00430) Order, August 1, 2014

⁷⁴ 2/11/15 Hearing Transcript at 10 25 21-10 27 10, Water District’s Application at Exhibit Group “B ”

thousand dollars (\$20,000) without first making newspaper advertisement for bids.

As recently as 2013, the Commission has held that it cannot grant a CPCN until a water district demonstrates its compliance with the bidding requirements mandated by KRS 424.260

Muhlenberg District has not yet responded to the Commission's written request of March 26, 2013 for evidence to demonstrate its compliance with KRS 424.260(1) in the selection of the supplier of the automated meter reading equipment. Such evidence is necessary to determine that the installation of this equipment will not result in inefficient economic investment and that the proposed loan to finance the purchase of the metering equipment is "consistent with the proper performance by the utility of its service to the public."⁷⁵

In the present case, the Water District has admittedly not complied with KRS 424.260(1), and the time for submitting evidence has closed. The Water District has projected the construction costs for the proposed tank entirely off of a non-binding one-page email from a tank supplier in February 2014.⁷⁶ It is unclear how these costs have changed or what other tank suppliers would bid for the project if advertised. If the Water District is permitted to comply with KRS 424.260(1) *after* a CPCN is granted, neither the Commission nor the other parties to the proceeding will have the opportunity to determine whether the Water District's bidding process for this \$2,000,000 project is reasonable, is the least cost option, is an efficient economic investment, and consistent with the Water District's proper performance. Moreover, if the Commission stops requiring water districts to demonstrate their compliance with KRS 424.260(1), the Commission's review of CPCN cases will be unduly narrowed. The CPCN must be denied.

⁷⁵ *In the Matter of Application of Muhlenberg County Water District for a Certificate of Public Convenience and Necessity to Construct and Finance a Water Improvements Project Pursuant to KRS 278 020 and KRS 278 300* (Case No 2013-00043) Order, April 19, 2013

⁷⁶ Water District's Application at Exhibit Group "B "

ii. The Proposed Tank Meets Every Prong of the “Wasteful Duplication Test”

A CPCN should not be granted if the proposed project will result in wasteful duplication.⁷⁷ “Wasteful duplication” as defined by the Kentucky Court of Appeals, then the state’s highest court, is “an excess of capacity over need,” “an excessive investment in relation to productivity or efficiency, and an unnecessary multiplicity of physical properties.”⁷⁸ The proposed tank meets each of these three prongs. First, as set forth fully above, the Water District has not proven it needs 750,000 gallons of additional storage capacity because, if constructed, the Water District will not utilize 100,000 of the 750,000 gallons even after **25 years** under Mr Harper’s highly aggressive (and flawed) population projections

The second factor defining “wasteful duplication” is an excessive investment in relation to productivity or efficiency. The estimated cost to construct the tank is \$2,000,000⁷⁹ The Water District plans to finance the construction using grant proceeds and a \$560,000 bond issue.⁸⁰ An investment of \$2,000,000 is certainly significant; the Water District’s net utility plant at year-end 2013 was only \$ 12,249,124.00⁸¹ The Water District failed to demonstrate that this significant investment produces equally significant gains in productivity or efficiency, especially because the proposed tank will be underutilized and the actual cost of the project remains unknown. Moreover, the proposed tank will also increase the Water District’s operation and maintenance expenses⁸²

⁷⁷ Kentucky Utilities Co v Public Service Commission, 252 S W 2d 885, 890 (Ky 1952)

⁷⁸ Id.

⁷⁹ John Horne Pre-filed Testimony at 5

⁸⁰ Id.

⁸¹ See Water District’s 2013 Annual Report

⁸² See Application at Exhibit D

Chairman Strong testified at hearing that the Water District would not have to raise rates as a result of the \$560,000 bond issue because of a recently retired debt issuance.⁸³ In Case No. 2012-00470, the Water District stated that it would make the final payment on a \$1,924,874 Kentucky Infrastructure Authority Loan in June 2013 and proposed to maintain in rates the amount of debt service annually required of the retiring debt to service the new bond issue.⁸⁴ When asked at the hearing in this case if the Water District would have to raise rates if the proposed tank was constructed at a site other than the Switzer site, Chairman Strong stated the Water District may have to because of the “burden” on the Water District.⁸⁵ Moreover, the Water District testified at hearing it could depreciate the entire \$2 million expenditure.⁸⁶ Thus, the Water District’s customers are currently paying rates that include nearly \$2 million of debt service not currently being paid and could be required to pay rates that include depreciation expense on \$2 million of plant if the water tank is constructed. Yet, the Water District claims it will receive \$1.44 million in grant funds and may increase its rates if the water tank is constructed at the Switzer site. The Commission should not tolerate this conduct.

The third factor defining “wasteful duplication” is an unnecessary multiplicity of physical properties. In preventing the needless duplication of facilities, the Court of Appeals has instructed the Commission to consider the “inconvenience to the public generally, and economic loss through interference with normal uses of the land, that may result from multiple sets of right of ways [sic], and a cluttering of the land with poles and wires.”⁸⁷ Here, the Water District proposes to clutter the land with large elevated water storage tanks that are devastating to the residents of Forest Hills by causing, on average, residents to suffer a 20% diminution in the value

⁸³ 2/11/15 Hearing Transcript at 11 09 00-11 09 30

⁸⁴ Water District’s Response to Intervenors’ Information Request No. 33

⁸⁵ 2/11/15 Hearing Transcript at 11 10 34-11 10 40

⁸⁶ 2/11/15 Hearing Transcript at 10 49 30-10 52 30

⁸⁷ Kentucky Utilities Co. v. Public Service Commission, 252 S.W.2d 885, 892 (Ky. 1952)

of their homes because of the proximity of the subdivision to the tank site⁸⁸ Further explanation of the effect on the Intervenors if the proposed tank is constructed is discussed later in this Brief.

The Water District could remove the existing 50,000 gallon tank and place a new tank on that site, which would lessen concerns of wasteful duplication and would reduce operation and maintenance expenses by reducing the number of storage tanks the Water District must operate and maintain. Alternatively, the Water District could co-locate the proposed tank at the site where the existing 50,000 gallon tank is located, which would reduce economic loss and impacts to the right of way. This alternative, as suggested by the Intervenors' witness Mr. Ritchie during the hearing,⁸⁹ would allow the Water District to construct a tank (assuming that the Commission finds a tank is needed) that will work with the system's existing hydraulics, already has sufficient piping, does not have the safety concerns that the Switzer site does, and is clearly an acceptable site for a tank as one is presently located there.

The water tank proposed in this proceeding is wastefully duplicative based upon all three factors set forth by the Court of Appeals because it will result in an excess of capacity over need, is an excessive investment in relation to productivity or efficiency; and will cause an unnecessary multiplicity of physical properties For these reasons, the Water District's request for a CPCN should be denied.

E. The Water District Failed to Perform a Reasonable Site Selection Process.

The Water District has not performed even a cursory site selection process since Case No 2012-00470 Specifically, the Water District admits that:

- No additional sites have been considered;⁹⁰

⁸⁸ See Pre-filed Testimony of E Clark Toleman

⁸⁹ 2/11/15 Hearing Transcript at 14 30 00-14 33 18

⁹⁰ Water District's Response to Intervenors' Information Request No 5

- There have been no analyses, studies, reports or other documents that analyze or review the selection of the site for the tank proposed in this proceeding;⁹¹
- There have been no economic studies that support the decision to build the proposed tank at the Switzer site;⁹² and
- There have been no changes in the Water District's methodology and/or criteria for siting water tanks.⁹³

The Water District's inaction is yet another example of its inadequate site selection process. As set forth fully in the Intervenor's Brief in the last case, the Water District failed to perform a reasonable site selection process when it purchased the Switzer site, as well as prior to requesting a CPCN, even though the built environment surrounding the site had changed significantly since the land was purchased.

The Commission does not grant a CPCN if the utility has not demonstrated that it sufficiently considered alternative locations for the proposed construction.⁹⁴ The Commission has held,

- "In performing its obligation under KRS 278.020(1), the Commission must balance all relevant factors, which in this case include...the availability of an alternative route, and the magnitude of the increased cost of that alternative route."⁹⁵
- "The Commission finds that LG&E/KU's study of alternative routes in this case was not sufficiently comprehensive.... Specifically, the Commission finds that LG&E/KU failed to adequately consider the use of existing rights-of-way,

⁹¹ Id. at 1

⁹² Id. at 3

⁹³ Id. at 9

⁹⁴ See, e.g., Case No 2005-00089, *In the Matter of The Application of East Kentucky Power Cooperative, Inc for a Certificate of Public Convenience and Necessity to Construct a 138KV Transmission Line in Rowan County, Kentucky* (Ky PSC August 19, 2005), Case No 2005-00142, *In the Matter of Joint Application of Louisville Gas and Electric Company and Kentucky Utilities Company for the Construction of Transmission Facilities in Jefferson, Bullitt, Meade, and Hardin Counties, Kentucky* (Ky PSC September 8, 2005), Case No 2005-00154, *In the Matter of Application of Kentucky Utilities Company for a Certificate of Public Convenience and Necessity for the Construction of Transmission Facilities in Anderson, Franklin and Woodford Counties, Kentucky* (Ky PSC September 8, 2005)

⁹⁵ Case No 2005-00089, *In the Matter of The Application of East Kentucky Power Cooperative, Inc for a Certificate of Public Convenience and Necessity to Construct a 138KV Transmission Line in Rowan County, Kentucky* (Ky PSC August 19, 2005)

transmission lines, and corridors. As such, the Commission cannot determine if approval of it would violate the standards set out in the Kentucky Utilities case.”⁹⁶

- “The Commission finds KU’s study of alternative routes in this case was not sufficiently comprehensive, as demonstrated by the Concerned Citizens’ identification of a route the Company had not thoroughly analyzed. KU’s ‘weekend review’ of the Concerned Citizens’ alternative by one of its engineers does not suffice to meet this requirement.”⁹⁷

The Commission has made clear that unless a utility proves that it thoroughly considered alternative locations, the Commission does not have sufficient information to determine whether the proposed construction would cause wasteful duplication.⁹⁸

The Water District freely admits that it has considered no alternatives to the Switzer site since it was acquired, other than creating a myriad of reasons to reject each and every site the Intervenor propose. In the last case, when asked to produce documents analyzing alternative sites, the Water District replied, “None. It was not, nor has ever been a question of site comparison, but the problem of finding a land owner willing to sell property for a tank site ..”⁹⁹ Similarly, when asked why the Water District purchased an acre in the northeast corner of the Switzer farm, instead of the northwest corner as it originally intended, the Water District stated “[t]his was the only location that Ms. Switzer was willing to sell.”¹⁰⁰ When asked to describe the Water District’s engineering criteria in the site selection process, the Water District’s response demonstrated that its “process” was inadequate: “Sufficiency of site for intended use, availability

⁹⁶ Case No. 2005-00142, *In the Matter of Joint Application of Louisville Gas and Electric Company and Kentucky Utilities Company for the Construction of Transmission Facilities in Jefferson, Bullitt, Meade, and Hardin Counties, Kentucky* (Ky. PSC September 8, 2005)

⁹⁷ Case No. 2005-00154, *In the Matter of Application of Kentucky Utilities Company for a Certificate of Public Convenience and Necessity for the Construction of Transmission Facilities in Anderson, Franklin and Woodford Counties, Kentucky* (Ky. PSC September 8, 2005)

⁹⁸ Id.

⁹⁹ Case No. 2012-00470, Water District’s Response to Item No. 3 of the Intervenor’s First Requests for Information

¹⁰⁰ Case No. 2012-00470, Water District’s Response to Item No. 13 of the Intervenor’s Supplemental Requests for Information

for purchase by [the Water District], and cost of site.”¹⁰¹ When the Intervenors asked for clarification on what “sufficiency” means, the Water District cited Webster’s Seventh Collegiate Dictionary¹⁰² The Water District has considered no alternative site since the last case, either.¹⁰³ The Water District’s disavowal of a site selection process in favor of the “willing seller” argument ignores the fact that it has the power of eminent domain.¹⁰⁴ When asked at hearing why the Water District would rather incur additional expenses associated with the Switzer site instead of exercising its power of eminent domain, Mr Strong simply said, “well, it’s a choice.”¹⁰⁵

The Water District’s failure to consider a single alternative site since the last case is particularly unreasonable after hearing the testimony of Mr Ritchie from Photo Science Geospatial Solutions in the last case regarding the importance of considering three criteria when locating utility facilities engineering criteria, natural environment, and the built environment.¹⁰⁶ This is similar to the Commission’s review of an application for a CPCN, in which it “must balance all relevant factors”¹⁰⁷ In Case No. 2012-00470, the Intervenors submitted the Jessamine South Elkhorn Water District Water Tank Siting Study (“Study”) that Photo Science prepared under Mr Ritchie’s supervision that demonstrated that even within a 1.25 mile radius of the Switzer site, there are numerous sites that satisfy the Water District’s engineering criteria that did not have natural environment concerns and had a significantly decreased effect on the

¹⁰¹ Case No 2012-00470, Water District’s Response to Item No 5 of the Intervenors’ First Requests for Information

¹⁰² Case No 2012-00470, Water District’s Response to Item No 5 of the Intervenors’ Supplemental Requests for Information

¹⁰³ Water District’s Response to Intervenors’ Information Request No 5

¹⁰⁴ 2/11/15 Hearing Transcript at 11 24 00-11 25 19

¹⁰⁵ Id

¹⁰⁶ 3/14/13 Hearing Transcript at 14 05 12-14 07 05

¹⁰⁷ Case No 2005-00089, *In the Matter of The Application of East Kentucky Power Cooperative, Inc for a Certificate of Public Convenience and Necessity to Construct a 138KV Transmission Line in Rowan County, Kentucky* (Ky PSC August 19, 2005)

built environment because fewer homes would be in the viewshed of the proposed tank.¹⁰⁸ The Study was not intended to supplant the Water District's site selection duty, it was instead designed to demonstrate the starting point of a suitable selection process. The Study was patterned after the Electric Power Research Institute / Georgia Transmission Corporation Transmission Line Siting Methodology, which Photo Science developed and has been used in Kentucky to site transmission lines for nearly a decade¹⁰⁹

The Water District ignored the process Mr. Ritchie described, choosing to do no site selection whatsoever while continuing the "just say no" refrain that has persisted throughout the Intervenors' dealings with the Water District. For each site proposed by the Intervenors themselves, as well as those in Mr. Ritchie's Study, the Water District has argued it is an unacceptable location for one reason or another; whether it is alleging title concerns, changing the minimum elevation of the land, or stating that the owner was not willing to sell. This pattern of unreasonable conduct conflicts squarely with Mr. John Horne's testimony at the hearing that the Switzer site is not the only site on which the tank could be constructed¹¹⁰. He testified: "I will in fact state here and now that in Jessamine County **there are a number of sites that will serve for an elevated water storage tank.** In no place have I ever inferred or testified that this is the only suitable site in Jessamine County for an elevated water storage tank. **I have no objection to the relocating** [of the tank site]"¹¹¹

Because the Water District has alleged irremediable fault with each and every site the Intervenors have proposed (while performing no site selection process itself), the Water District must consider the other acceptable sites a secret, as the locations certainly have not been

¹⁰⁸ See Intervenors' January 4, 2013 Notice of Filing and attachment thereto. Mr. Ritchie also attached a copy of the Study as exhibit GMR-2 to this prefiled testimony in this proceeding.

¹⁰⁹ Jessamine South Elkhorn Water District Water Tank Siting Study ("Study"), p. 3.

¹¹⁰ 2/10/15 Hearing Transcript at 14:04:39 – 14:05:03, 2/10/15 Hearing Transcript at 14:05:16 – 14:05:26.

¹¹¹ Id.

disclosed to the Commission or the other parties. Regardless, for a minor sum and minimal effort, the Water District could have performed a reasonable site selection study that appropriately considered the built environment. It has chosen not to do so, despite the close proximity of the built environment to the proposed tank and Mr. Richie's suggestions regarding same. Because the Water District has failed to consider alternative locations, the CPCN should be denied.

F. The Switzer Site Is Not an Acceptable Location for an Elevated Storage Tank.

i. The Proposed Tank Will Cause Economic Loss and Poses a Safety Risk to Nearby Residents

If the Commission grants the CPCN the Water District has requested, it will force the residents of Forest Hills to suffer economic loss. For some residents, it could likewise endanger their safety and ability to sell their home. The residents of Forest Hills did not choose this risk; the water tank was not constructed when the subdivision was developed and the recorded plat did not mention the proposed project. Because the Water District has testified there are numerous locations on which the proposed tank could be constructed, there is no reason to allow this to occur. There was substantial testimony at the hearing from both the Water District's and Intervenor's witnesses, that was often confusing to the witnesses and the audience alike, regarding how and when the residents of Forest Hills learned of the proposed tank, as well as how the decline in property values were to be calculated. At the end of the day, however, the Commission needs to utilize little other than common sense to reject the Water District's contention that constructing a 150 foot structure holding 750,000 gallons of water a mere 200 hundred feet away from a residence in what is an otherwise pastoral setting will not reduce the property value of that residence and those around it.

As in the last case, the Water District called William L. Berkley, Jr. as a witness regarding the impact to the homes in Forest Hills if the tank is constructed at the end of Chinkapin Drive. Two things were clear by the end of Mr. Berkley's testimony at the hearing: (1) Mr. Berkley has virtually no knowledge of the Water District's proposed tank site and the nearby homes; and (2) there is no structure that the Water District could have proposed constructing that Mr. Berkley would have conceded would negatively impact the value of homes in Forest Hills. His testimony and opinions strain credulity to the point of the absurd.

Mr. Berkley attempted to opine about the property values in Forest Hills, without knowing.

- The distance from the proposed tank site to the closest residence in Forest Hills;¹¹²
- The number of houses that have been constructed on Chinkapin Drive since Mr. Berkley submitted his "Market Study" in 2013;¹¹³
- The number of houses that have been constructed on Burr Oak Drive since Mr. Berkley submitted his "Market Study" in 2013,¹¹⁴
- The proximity of the newly constructed homes to the proposed tank site;¹¹⁵ and
- The most recent sale of a home in Forest Hills, despite purportedly basing his testimony on sales data.¹¹⁶

It is unfathomable that Mr. Berkley has testified about the property values of homes without bothering to determine how close the homes are to the proposed tank site.

Mr. Berkley claims that the proposed tank will have zero impact to the property value of the homes in Forest Hills, including the residence of Dr. Donald Douglas, who lives closest to the proposed tank site and shared his concerns at the outset of the hearing about the impact of the

¹¹² 2/10/15 Hearing Transcript at 11:20:55 – 11:21:12

¹¹³ Id. at 10:32:00-10:32:38

¹¹⁴ Id.

¹¹⁵ Id. at 10:32:38-10:32:52

¹¹⁶ Id. at 10:51:05-10:57:31

tank on his home. Mr. Berkley alleges that replacing an open and pastoral view with a view similar to this will not affect the value of Dr. Douglas' home:¹¹⁷



¹¹⁷ This photograph was taken by Mr. Toleman and was part of his Prefiled Testimony. The photograph depicts a 750,000 gallon elevated water tank at a viewing distance of 200 feet.

The structure the Water District has proposed constructing is roughly 150 feet tall and sits atop eight legs, and will be located roughly 200 feet away from Dr. Douglas' home Mr. Berkley, when pushed at hearing, refused to concede that even if the tank was **300 feet tall**, was **painted orange**, and was close enough that Dr Douglas could **reach and out touch it from his window**, there would be a negative impact to his property value.¹¹⁸ This flies in the face of common sense and proves that no weight should be afforded to Mr. Berkley's testimony

In contrast to Mr. Berkley's opinion is the testimony of E. Clark Toleman on behalf of the Intervenors. In Case No. 2012-00470 and in this proceeding, Mr. Toleman testified that if the proposed tank is constructed, on average, each of the homes in Forest Hills will experience a diminution in property value of 20%. Prior to filing testimony in this case, Mr Toleman visited Forest Hills, analyzed the proximity of the tank site to the homes and looked at the sales of new and existing homes in the subdivision, in order to determine if his 20% diminution factor remained reasonable.¹¹⁹ After listening to Mr. Berkley claim his 0% conclusion was based solely on "paired sales," prior to testifying at the hearing Mr. Toleman re-reviewed the sales in Forest Hills The paired sales for lots in Forest Hills demonstrated that from 2006 to 2012, even without adjusting for inflation, the value of the lots declined by over 43%.¹²⁰ This sales trend is proof of the conservative reasonableness of Mr. Toleman's expectation of 20% in diminution This means that if the tank is constructed, the lost property values in Forest Hills will be \$3,620,000, which greatly exceeds the Water District's estimated cost of the tank.¹²¹

Other jurisdictions have recognized that the construction of a water tank has a negative impact to the values of nearby existing homes. For example, the Court of Appeals of Tennessee

¹¹⁸ 2/10/15 Hearing Transcript at 10 59 00 -11 03 00

¹¹⁹ Pre-filed Testimony of E Clark Toleman

¹²⁰ Intervenors' Post Hearing Data Response No 2

¹²¹ Pre-filed Testimony of E Clark Toleman at 7

recently affirmed a trial court's acceptance of an expert's opinion that the construction of a water tank (that was only a 50 foot structure) would cause a 12.5% diminution in the owner's property value due to "the loss of the property's hilltop view and the decline in aesthetics with the water tank on the highest hilltop on the property"¹²² Relatedly, a New Jersey court ordered the Ridgewood municipal water system to *remove* an elevated water tank that had been recently constructed because of the effect on nearby residences. The court concluded:

*In authorizing the construction of the Van Emburgh tank the commissioners gave no thought to the character of the neighborhood nor to the effect which the presence of the tank would have on property values. No consideration was given to alternate and less objectionable methods of providing adequate storage facilities Apparently the fact that Ridgewood owned the Van Emburgh site was what caused the village commissioners to decide to locate the tank on that tract.*¹²³

The court explicitly rejected the argument that because the water utility owned the site on which the tank was constructed it was consequently an appropriate location for a tank, especially when the tank was anomalous to the character of the neighborhood. These facts parallel the facts in this case. The Water District has repeatedly justified its use of the Switzer site based on its ownership of the site despite the character of the immediately adjacent neighborhood in Forest Hills. The anomalous nature of the proposed tank in the Forest Hills area was demonstrated at hearing; the size and location of the structure would violate a host of zoning regulations if not for the Water District's exemption from same.¹²⁴ In fact, Mr. John Horne admitted in his rebuttal testimony that if the proposed tank had been constructed before Forest Hills was developed,

¹²² Brentwood v Cawthorn, 2010 WL 1931095 (Tenn Ct App 2010)

¹²³ Washington Tp , Bergen County v Village of Ridgewood, 46 N J Super 152 (1957) (emphasis added)

¹²⁴ 2/10/15 Hearing Transcript at 13 58 00-13 58 35

“most likely the only homes that would be able to view the Switzer tank would be the same ones” that were already constructed beforehand.¹²⁵

In addition to negatively affecting the property values of the residences in Forest Hills, the proposed tank, if constructed, will pose a safety concern to the residences closest to the tank site, and could render the properties unsellable under federal lending regulations. Incredibly, the Water District had never surveyed precisely how close the tank would be to the nearest residences prior to the hearing in this case. When requested by Commission Staff to do so at the hearing, the Water District surveyed the area and found that Dr. Douglas’ home is less than 250 feet away from the center of the tank.¹²⁶ Other residences currently under construction will be similarly affected.¹²⁷ The Water District’s estimation is not precise because, as the survey indicates, it was “extrapolated from [a] generic CADD drawing obtained from Caldwell Tanks.”¹²⁸ At the hearing, Mr. John Horne could likewise not testify to the actual height of the tank, saying it was “yet to be determined.”¹²⁹ As such, the dimensions of the actual tank, if constructed, could vary somewhat from those utilized in the survey. The survey presently shows that in the event of failure, the tank would fall within feet of multiple residences.¹³⁰ As Mr. Ritchie explained at hearing, even if the residences are not physically struck by the tank should the tank fail, release of 750,000 gallons of stored water would demolish the residences.¹³¹ This is a real concern, less than a week ago the Commission issued an order regarding a recent

¹²⁵ John Horne Rebuttal testimony at 7

¹²⁶ See Water District’s Responses to J Horne Hearing Requests at page 5 of 15

¹²⁷ Id.

¹²⁸ Id.

¹²⁹ 2/11/15 Hearing Transcript at 13 54 45 13 55 11

¹³⁰ See Water District’s Responses to J Horne Hearing Requests at page 5 of 15

¹³¹ 2/11/15 Hearing Transcript at 14 23 31-14 23 45

catastrophic water tank collapse that destroyed a nearby church and maintenance shed despite being a ground tank that only held 177,000 gallons of water.¹³²

In recognition of the inherent and obvious danger of being within the fall distance of elevated structures, the United States government has implemented valuation protocols residential appraisers must follow for federally-backed mortgages that require the appraiser to “note and comment” on properties that are within the fall distance of elevated structures.¹³³ The guidelines “require that a site be rejected if the property being appraised is subject to hazards, environmental contaminants, noxious odors, offensive sights or excessive noises *to the point of endangering the physical improvements or affecting the livability of the property, its marketability, or the health and safety of its occupants.*”¹³⁴ Building the proposed tank within or near the fall distance of nearby residences could therefore blight the property and render it unsellable for purposes of the federal valuation standards. It is patently unfair to force Dr. Douglas and others to take on this safety risk and marketability concern when the Water District freely admits there are other locations for the tank

In short, the Switzer site is not an acceptable location for an elevated storage tank, regardless of the number of gallons stored. Common sense, paired sales analyses, and findings from other jurisdictions demonstrate that the construction of the proposed tank will negatively affect the property values of the homes in Forest Hills. The Water District’s only rebuttal was the testimony of Mr. Berkley that should be afforded no weight due to the unreasonableness of his conclusions and lack of knowledge regarding facts fundamental to the testimony he gave. In addition to economic loss, there are safety risks for those closest to the proposed tank site that

¹³² *In the Matter of US 60 Water District Alleged Failure to Comply with 807 KAR 5 006, Sections 26 and 27, and 807 KAR 5 066, Section 7* (Case No. 2015-00037) Order, April 2, 2015

¹³³ Intervenor’s Hearing Exhibit 5

¹³⁴ *Id.* (emphasis in original)

could limit the marketability of the home, even at a reduced price. None of these negative outcomes are necessary, as the Water District has conceded. The tank, if deemed needed, should be constructed elsewhere.

ii. The Water District's Decisions to Incur Costs Related to the Switzer Site Before Obtaining a CPCN Does Not Render the Site Acceptable.

In dealing with the Intervenors, as well as throughout this proceeding, the Water District focuses on the additional expenses it will be required to incur if the proposed water tank is constructed at a location other than the Switzer site. These expenses have repeatedly been referred to as "relocation costs," despite the fact that the water tank has not been constructed.¹³⁵ In Case No. 2012-00470, the Water District stated in discovery it had spent around \$275,000 in preparing to use the Switzer site for the proposed tank.¹³⁶ Remarkably, at the hearing in this case, none of the Water District's witnesses could state with any certainty the current amount of expenses related to the Switzer site and the proposed tank thereon. Mr. John Horne guessed \$500,000, but a post-hearing data response showed that the actual amount is more than double - **\$1,110,614**.¹³⁷ The Water District has spent **hundreds of thousands of dollars** upsizing lines, and looping and tying infrastructure around a proposed tank site for which no CPCN has been granted. The Water District has also paid Horne Engineering, Inc., **\$399,838.73**¹³⁸ associated with this project, including over **\$100,000** for the hearing in Case No. 2012-00470,¹³⁹ in which neither Mr. John Horne nor Mr. Chris Horne filed written testimony. It is shocking that the

¹³⁵ For example, in the Water District's Answer and exhibits thereto in Case No. 2011-00138, "relocation" was mentioned twenty times.

¹³⁶ All of the expenses are set forth in the Water District's Response to Item No. 23 of the Intervenors' First Request for Information, as amended in the Water District's Response to Item No. 11 of the Intervenors' Supplemental Requests for Information in Case No. 2012-00470.

¹³⁷ See Water District's Responses to J. Horne Hearing Requests at page 6 of 15.

¹³⁸ Id.

¹³⁹ Id.

Water District has spent over a million dollars planning for a project that is supposed to cost two million dollars

The Water District, however, did not have to incur these expenses prior to obtaining a CPCN. For example, the Water District could have negotiated an option to purchase the Switzer site pending approval of a CPCN. Similarly, the Water District could have waited to upsize the lines in the area of the proposed tank until after it received a CPCN. It did neither. In fact, it continued upsizing lines as recently as 2014 even though it knew use of the Switzer site was disputed. It is for the Commission to determine whether these construction activities, which the Water District claims were performed because of the proposed tank at the Switzer site, violates KRS 278.020(1)'s prohibition on beginning the "construction of any plant, equipment, property, or facility" prior to obtaining a CPCN as the Water District has essentially conceded they were not "ordinary extensions of existing systems in the usual course of business," by virtue of classifying them as tank expenditures.

If the Water District is permitted to successfully argue that it should be granted a CPCN because it will forfeit expenses it incurred *before* applying for a CPCN, utilities would be motivated to incur significant, and possibly imprudent, expenses before seeking a CPCN to support the granting of the CPCN, contravening the spirit and purpose of KRS 278.020. The Commission has previously acknowledged with respect to financing transactions governed by KRS 278.300 that such retroactive approval "would encourage utilities to enter into unauthorized transactions without obtaining the necessary regulatory approval and then present the transaction

to the Commission as a fait accompli.”¹⁴⁰ The same concern is present here; the Commission should reach the same conclusion.

G. The Water District Treated the Intervenors Unreasonably.

The Water District’s treatment of the Intervenors, who are its customers, has been unreasonable, inconsistent, and unfair, violating KRS 278.280(1). As soon as the Intervenors began questioning the adequacy of the Switzer site in April 2010, the Water District delegated its responsibilities with respect to site selection, acquisition, and funding to the Intervenors. Not only was this delegation wrongful, it was done so inconsistently as the Water District sent the Intervenors on a year-long search for an alternate site that amounted to little more than a wild goose chase in which the Intervenors investigated and attempted to purchase several alternate sites – certain of which were suggested by the Water District itself – only to have the Water District abruptly reverse course and deem the site unreasonable, or increase the expected “relocation costs” the Intervenors would have to pay to staggering amounts approaching \$300,000 with onerous accompanying conditions.¹⁴¹ This practice of unfairly transferring its duties to customers is similar to the Water District’s conduct in Case No. 93-406, where a customer filed a complaint after the Water District refused to service three additional meters unless the customer had a hydraulic analysis performed.¹⁴² The Commission ordered the Water District, not the customer, to perform the hydraulic analysis and ultimately ordered the Water District to serve the three requested meters.¹⁴³

¹⁴⁰ *In the Matter of Kentucky Infrastructure Authority’s Joint Application on Behalf of Certain Water Districts for Authority to Borrow Funds to Refinance Certain Indebtedness to the Kentucky Infrastructure Authority* (Case No 2005-00058) Order, Aug 25, 2005

¹⁴¹ The detailed history of these events is set forth on pages 34-38 of the Intervenors’ Post-Hearing Brief in Case No 2012-00470

¹⁴² Case No 93-406, *In the Matter of Armster Bruner, Jr v Lexington-South Elkhorn Water District* (Ky PSC Aug 19, 1994)

¹⁴³ Id.

The Water District's unreasonable treatment of the Intervenors has continued since the last case. Despite having had the Intervenors devote a year of time and money to acquire another site, the Water District claimed – for the first time – in this case that it could not utilize the \$1 million grant at a site other than the Switzer site due to limitations associated with the grant.¹⁴⁴ The Intervenors pointed out in their testimony that if this was true, the Water District's dealings with the Intervenors regarding acquiring an alternate lot had clearly been in bad faith because the Water District has no intention to utilize any location other than the Switzer site. In rebuttal testimony and at the hearing, the Water District reversed course again, claiming that the funds could possibly be used at another location.¹⁴⁵ Mr. Strong claimed at hearing that he knew it could be difficult to modify the grants such that they could be used at another location during the period of time he had the Intervenors trying to secure an alternate site.¹⁴⁶ When asked why the Water District never mentioned this purported limitation to the Intervenors, Mr. Strong stated "there was no reason to have that conversation."¹⁴⁷ The Intervenors, who spent significant time and money, certainly disagree.

The Water District has also expended considerable effort with respect to Forest Hills and the actions of its residents' association. It was revealed in discovery that Mr. John Horne had multiple conversations with a Forest Hills resident, in which he sought information regarding the discussions and attendance at Forest Hills Residents' Association, Inc.'s meetings.¹⁴⁸ The Intervenors are flummoxed as to why this information could possibly be relevant to the Water District or the Commission, as it has no bearing whatsoever on whether the Water District has met its burden of proof in this case.

¹⁴⁴ Water District's Response to Intervenor's Information Request No. 30

¹⁴⁵ L. Nicholas Strong Rebuttal Testimony at pages 3-4

¹⁴⁶ 2/11/15 Hearing Transcript at 11:25:30-11:26:56

¹⁴⁷ Id.

¹⁴⁸ Water District's Response to Intervenor's Information Request No. 7

The notes produced in discovery also show that Mr. Horne was advising a Forest Hills resident regarding the legal arguments made in Case No. 2012-00470 and told the resident that the Water District is “not going to back down” with regard to the use of the Switzer site.¹⁴⁹ The notes also disclose that the Water District, while complaining about the legal costs associated with this project because of Forest Hills’ intervention, had their attorney comb through Forest Hills’ by-laws.¹⁵⁰ These actions, in which customers have been treated as foes to be defeated, have led to the ballooning costs associated with this project

It is important to remember that the Intervenors were, and remain, *customers* of the Water District. When approached by *customers* with serious concerns regarding the Water District’s plans for the proposed water tank, the Water District allowed the Intervenors to believe it was the customers’ duty to investigate, select, and purchase an alternate site. During the hearing a number of questions were asked of Mr Davis regarding the investigation he did prior to constructing his home regarding the Water District’s ownership of the adjacent land Mr. Davis testified that he examined the recorded plat that showed the layout of Forest Hills¹⁵¹ It is undisputed that the plat makes no mention of a proposed water tank, instead referring to a water line and access easement.¹⁵² As with the inquiries regarding the number of persons who attended Forest Hills’ residents’ meetings, this information has no bearing on whether the Water District has met its burden of proof in this proceeding with respect to its site selection process

The Water District’s customer service practices with respect to the Intervenors have been unreasonable. In addition to denying the CPCN, the Intervenors respectfully request the

¹⁴⁹ Id

¹⁵⁰ Id

¹⁵¹ 2/11/15 Hearing Transcript at 12 05 36-12 36 50

¹⁵² Intervenors’ Post Hearing Data Response No 1

Commission, pursuant to its authority in KRS 278.260, enter an order finding that the Water District violated its duty set forth in KRS 278.280(1) to provide reasonable service

IV. CONCLUSION

The Water District has failed to meet the burden of proof required by KRS 278.020 with respect to the 750,000 gallon water tank, as well as the 500,000 gallon alternative. Despite spending over a \$1 million dollars, (1) the Water District's demand and projection information is critically flawed; (2) the hydraulic analysis is incomplete and unreliable, (3) no bids have been advertised, thereby violating Kentucky law, (4) no site selection process has occurred; and (5) the Water District persists in its unreasonable treatment of its customers. The Commission cannot grant the CPCN the Water District has requested without deviating from well-established law on these fundamental issues. For the foregoing reasons, the Intervenors respectfully request that the Commission deny the Water District's application for a CPCN and enter an order finding the Water District's services and practices with respect to the Intervenors unreasonable and that the proposed Switzer site is an unreasonable location for any water tank.

Dated the 8th day of April 2015.

Respectfully submitted,

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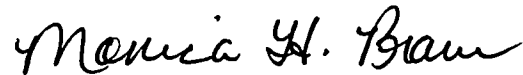
Certificate of Service

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 8th day of April 2015:

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