

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

FOREST CREEK, LLC)	
)	
COMPLAINANT)	
)	
V.)	CASE NO. 2011-00297
)	
JESSAMINE-SOUTH ELKHORN WATER DISTRICT)	
)	
DEFENDANT)	

ORDER

Forest Creek, LLC ("Forest Creek") has filed a formal complaint against Jessamine-South Elkhorn Water District ("Jessamine District") in which it requests that the Commission order Jessamine District to extend water service to a proposed real estate development in accordance with Option I of the Water District's Rules and Regulations. Jessamine District has moved for dismissal for lack of subject matter jurisdiction, or in the alternative, for the proceeding to be held in abeyance. By this Order, we deny Jessamine District's motion and establish a procedural schedule in this matter.

BACKGROUND

Forest Creek, a limited liability company organized pursuant to KRS Chapter 275,¹ owns approximately 458.60 acres of real estate ("the Property") near

¹ See Forest Creek, LLC's Articles of Incorporation, available at <https://app.sos.ky.gov/corps/cans/72/0621172-06-99999-20050907-AOG-427885-PU.pdf> (last visited Mar. 12, 2012).

Murphy's Lane and US Highway 68 in Jessamine County, Kentucky. Forest Creek proposes to build 661 residential homes and a golf course on the Property.

Jessamine District, a water district organized pursuant to KRS Chapter 74, owns and operates facilities used in connection with the distribution and furnishing of water for compensation to 2,584 customers in Jessamine County, Kentucky.² It is a utility subject to Commission jurisdiction.³ Its territory includes the area in which the Property lies.

Jessamine District has filed with the Commission rules and regulations that govern its provision of water service. Rule 26 addresses the extension of water distribution mains and provides two options for extensions of service. Option I provides that extensions will be made in accordance with Commission regulations. Commission regulations require that an applicant desiring an extension to a proposed real estate development pay to a water utility the entire cost of the extension and that the water utility refund to the applicant over a 10-year period a sum equal to the cost of 50 feet of the extension for each new customer connected to the extension.⁴ Option II provides that an applicant may construct and donate to Jessamine District a water main extension as a contribution in aid of construction. Any extension made under Option II is ineligible for refunds.

² *Annual Report of Jessamine-South Elkhorn Water District to the Public Service Commission for the Year Ending December 31, 2010* at 5, 27.

³ KRS 278.010(3)(d).

⁴ 807 KAR 5:066, Section 11(3).

On April 27, 2007, Forest Creek, through its representative, requested that Jessamine District extend water service to the Property.⁵ In its request for extension, Forest Creek elected to proceed under Option II. On May 2, 2007, Forest Creek, through its representative, executed an “Interim Water Service Agreement” with Jessamine District⁶ that incorporated the terms of the Jessamine District’s Rules and Regulations and “Extension Policy Procedure.”⁷

Over the next three years, Forest Creek and Jessamine District discussed the preparation of engineering plans and designs for water service to the Property, but apparently were unable to agree on several issues related to the proposed extension’s design and construction. On August 11, 2010, Forest Creek submitted a request to Jessamine District to proceed with the proposed extension of service under Option I rather than Option II of Jessamine District’s Rules and Regulations.⁸ On December 1, 2010, Jessamine District’s Board of Commissioners voted to refuse Forest Creek’s request and to petition the Jessamine Circuit Court for a declaration of Jessamine District’s rights under the Interim Water Service Agreement.⁹

On December 17, 2010, Jessamine District filed a Petition for Declaration of Rights in Jessamine Circuit Court. In its Petition, it requested a judgment that the

⁵ Forest Creek’s Complaint at ¶ 4. See also Petition for Declaration of Rights at ¶ 4, *Jessamine-South Elkhorn Water Dist. v. Forest Creek, LLC*, No. 2010-CI-001394 (Jessamine Cir. Ct. Ky. filed Dec. 17, 2010) (hereinafter “Petition for Declaration”).

⁶ Petition for Declaration at ¶¶ 5-6.

⁷ Jessamine District’s “Extension Policy Procedure” imposes several conditions and fees upon applicants requesting water service. See Petition for Declaration, Exhibit C. It has not been filed with the Commission nor has it been incorporated into Jessamine District’s filed rate schedules. No requirement or fee set forth in the Extension Policy Procedure is found in Jessamine District’s filed rate schedules.

⁸ Petition for Declaration at ¶ 12.

⁹ *Id.* at ¶ 17.

Interim Water Service Agreement with Forest Creek is enforceable and that any extension of water service to the Property must proceed under Option II of Rule 26 of Jessamine District's Rules and Regulations. It asserted that the Interim Water Service Agreement prohibits Forest Creek from unilaterally changing the selected extension option and that Forest Creek "is required to proceed under Option II."¹⁰

On February 1, 2011, Forest Creek filed its Answer and Counterclaim. In its Counterclaim, Forest Creek requested a judgment holding that Jessamine District must extend water service to Forest Creek's property under Option I; a determination that the fees Jessamine District assessed to Forest Creek in connection with Forest Creek's application for extension of water service were improper and unlawful; a refund of all fees that Jessamine District assessed to Forest Creek in connection with Forest Creek's application for extension of water service; and an order directing that a third party engineer be appointed to review all plans regarding the extension of service to Forest Creek's real estate development and that Jessamine District's engineer be prohibited from engaging in any review of the proposed extension.¹¹

On June 23, 2011, the Commission moved to intervene in the action before Jessamine Circuit Court and sought dismissal of the action on the grounds that it involved issues within the Commission's exclusive jurisdiction.¹² After a hearing in the

¹⁰ *Id.*

¹¹ Forest Creek's Answer and Counterclaim at 10, *Jessamine-South Elkhorn Water Dist. v. Forest Creek, LLC*, No. 2010-CI-001394 (Jessamine Cir. Ct. Ky. filed Feb. 1, 2011).

¹² Public Service Commission of Kentucky's Motion to Intervene at ¶ 12 *Jessamine-South Elkhorn Water Dist. v. Forest Creek, LLC*, No. 2010-CI-001394 (Jessamine Cir. Ct. Ky. filed June 23, 2011).

matter,¹³ Jessamine Circuit Court granted the Commission's motion to intervene.¹⁴ On August 24, 2011, Jessamine Circuit Court dismissed Jessamine District's Petition for Declaration of Rights.¹⁵ Jessamine District has appealed this Order to the Kentucky Court of Appeals.¹⁶

PROCEDURE

On August 5, 2011, Forest Creek filed with the Commission a formal complaint against Jessamine District. In its Complaint, it alleged that Jessamine District arbitrarily and capriciously refused to provide water service to the Property and requested that Commission order Jessamine District to extend water service to the Property under Option I of the Water District's Rules and Regulations.¹⁷

On September 19, 2011, Jessamine District filed its Answer in which it denied acting in an arbitrary or capricious manner and asserted that the Commission lacked jurisdiction to consider the Complaint and that Forest Creek had waived its right to bring any complaint before the Commission.

With its Answer, Jessamine District also filed a motion to hold this proceeding in abeyance pending a final decision on its appeal of Jessamine Circuit Court's dismissal of its Petition for Declaration of Rights. On September 28, 2011, Forest Creek filed a reply in opposition to this motion. On October 7, 2011, Jessamine District responded to

¹³ The Court heard the Commission's Motion to Intervene and Motion to Dismiss on July 28, 2011.

¹⁴ *Jessamine-South Elkhorn Water Dist. v. Forest Creek, LLC*, No. 2010-CI-001394 (Jessamine Cir. Ct. Ky. Aug. 15, 2011).

¹⁵ *Jessamine-South Elkhorn Water Dist. v. Forest Creek, LLC*, No. 2010-CI-001394 (Jessamine Cir. Ct. Ky. Aug. 24, 2011).

¹⁶ *Jessamine-South Elkhorn Water Dist. v. Forest Creek, LLC*, No. 2011-CA-001714 (Ky. Ct. App. Nov. 30, 2011).

¹⁷ Forest Creek's Complaint at ¶¶ 7-9 and 11.

the reply and moved for dismissal of the Complaint for lack of jurisdiction. Forest Creek responded to the motion to dismiss on October 20, 2011.

DISCUSSION

Jessamine District's motions present the following issues: (1) Does the Forest Creek's Complaint involve an issue of utility rates or service and thus a matter within the Commission's jurisdiction? (2) If the Commission has jurisdiction over the issues alleged in the Complaint, should the Commission delay its review of the Complaint until appellate review of the dismissal of Jessamine District's action for declaration of rights is completed?

As to the first issue, Jessamine District argues that its dispute with Forest Creek involves the interpretation of the Interim Water Service Agreement, does not involve an issue of utility rates or service, and is therefore outside the Commission's jurisdiction. The Commission, it argues, has no jurisdiction over matters of contract interpretation where rates and service are not directly affected. It asserts that the dispute before the Commission centers upon the expenses that Forest Creek must pay under the Agreement and Jessamine District's review of Forest Creek's water extension plan and does not involve any rate that Jessamine District assesses. It notes that Forest Creek is not currently a customer of Jessamine District and that any expense or cost that a real estate subdivision developer incurs for the extension of a water main is not a rate.

The Commission's jurisdiction over complaints related to utility rates and service is clearly established. KRS 278.260(1) provides that the Commission "shall have original jurisdiction over complaints as to rates and service." KRS 278.280(3) provides:

Any person or group of persons may come before the commission and by petition ask that any utility subject to its

jurisdiction be compelled to make any reasonable extension. The commission shall hear and determine the reasonableness of the extension, and sustain or deny the petition in whole or in part.

In *Smith v. Southern Bell Tel. Co.*, 268 Ky. 421, 104 S.W. 2d 961, 963 (Ky.1937), a case decided shortly after the Commission's creation, the Kentucky Court of Appeals addressed a suit that a public official brought in circuit court to require a utility to furnish a certain type of service. Finding that the circuit court lacked jurisdiction over the matter, the Court declared that "the primary jurisdiction and authority to fix rates, establish reasonable regulation of service, and to alter and make changes to said regulations and to make investigation as to any change in service . . . is exclusively and primarily in the Commission" ¹⁸

As used in KRS Chapter 278, "service" includes the extension of utility service and the rules governing such extensions. KRS 278.010(13) broadly defines "service" to include "any practice or requirement in any way relating to the service of any utility." The Commission's regulation ¹⁹ regarding extension of water mains to real estate subdivisions refers to KRS 278.280(2), which authorizes the Commission to "prescribe rules for the performance of any service or the furnishing of any commodity of the character furnished or supplied by the utility."

¹⁸ See also *Carr v. Cincinnati Bell, Inc.*, 651 S.W.2d 126, 128 (Ky. 1983) (complaints "to do with the type and quality of service" are within the Commission's exclusive jurisdiction); *Bees Old Reliable Shows, Inc. v. Kentucky Power Co.*, 334 S.W.2d 765 (Ky. 1960) ("the Public Service Commission has jurisdiction over questions concerning rates and services generally").

¹⁹ 807 KAR 5:066 provides:

NECESSITY, FUNCTION, AND CONFORMITY: KRS 278.280(2) provides that the Public Service Commission (hereinafter referred to as "commission") shall prescribe rules for the performance of any service or the furnishing of any commodity by the utility. This administrative regulation establishes general rules which apply to water utilities.

On its face, Forest Creek's complaint involves matters within the Commission's jurisdiction. It involves procedures for the design and construction of water main extensions and for the allocation and payment of the cost of such extensions. The ultimate relief sought is an extension of water service to an area within Jessamine District's territory where service facilities are allegedly inadequate.

Moreover, the *Interim Water Service Agreement* clearly relates to the provision of utility service. It sets out fees that Forest Creek must pay as a condition for obtaining the extension of service. It provides the procedures for which the plans for the proposed water main extension will be reviewed, defines Forest Creek's responsibilities and obligations during all phases of the extension and upon completion of the main extension, and establishes general design specifications for the water main extension. It further addresses Forest Creek's right to any refunds from the cost of the water main extension.

The Commission does not accept Jessamine District's premise that the Complaint merely involves an issue of contract interpretation. To the extent that the *Interim Water Service Agreement* sets forth any conditions for the provision of water service, KRS 278.160 and 807 KAR 5:011, Section 13, require that it be filed with the Commission or its terms and provisions be set forth in Jessamine District's filed rate schedules and rules. Our initial review of the *Interim Water Service Agreement* suggests that it contains terms and provisions that are not set forth in Jessamine District's filed rate schedules or rules. Hence, one issue to be examined is Jessamine

District's compliance with the provisions of KRS Chapter 278. This issue clearly involves the Commission's statutory role as the enforcer of KRS Chapter 278.²⁰

The Complaint also requires the Commission to examine and determine the reasonableness of conditions for the provision of service that Jessamine District has not previously placed before us. Jessamine District's authority to require an applicant for a water main extension to enter an Interim Water Service Agreement relies heavily upon Rule 26. Rule 26, however, does not address several key points. It does not address an applicant's right to revoke or change its election. It does not provide a time period for which an election remains effective or state the conditions, if any, under which an election may be withdrawn, revoked or changed. Rule 26 does not expressly prohibit an applicant from revoking or changing its election. It does not list or identify the procedures and requirements that are associated with each option. It does not specify the contents of any standard contract, form, or other document that must be executed when making the election. There is no standardized contract or agreement for water main extension or other standardized form related to a water main extension within Jessamine District's filed tariff.

KRS 278.260(1) requires the Commission to investigate any rule or regulation of a utility that affects or relates to any utility rate or service. If, after a hearing, the Commission finds the rule or regulation is "unjust, unreasonable, unsafe, improper, inadequate or insufficient", the Commission must "determine the just, reasonable, safe, proper, adequate or sufficient rules, regulations, practices, . . . or methods to be

²⁰ KRS 278.040(1).

observed, furnished, . . . enforced or employed” and to fix the same by order, rule or regulation.²¹

By requiring the Commission to consider and decide such questions, the General Assembly sought to ensure that interpretations affecting utility rates and service are uniformly and consistently applied to all public utilities and their customers. The Court in *Smith v. Southern Bell Tel. Co.* noted as much:

The Public Service Commission is an administrative agency set up and appointed by law for the purpose of hearing the facts and establishing reasonable rules, rates, and services to the public in order to secure conformity of services and rates affecting all classes of customers, because for this burden to fall exclusively on the courts and to give the courts the primary and exclusive jurisdiction to pass upon the reasonableness of the rules, services, rates, schedules, practices, etc., of the telephone and telegraph companies, would lead to confusion and uncertainty, because the result might be that one court would say that certain rules and regulations are unreasonable, and another court might regard the same rules reasonable; consequently, a subscriber of the same class in one locality might obtain one kind of service and the same service be denied a subscriber at another place.²²

Assuming *arguendo* that the sole question that the Complaint presents is one of contract interpretation, we find no merit in Jessamine District’s contention that the Commission lacks the authority to make such interpretation. Kentucky courts have held that the Commission’s authority to consider a complaint regarding utility rates and service “includes the authority to adjudicate private contractual rights involving utility

²¹ KRS 278.280(1).

²² *Smith* at 961. See also *Grindsted Products, Inc. v. Kansas City Power & Light Co.*, 901 P.2d 20 (Kan. Ct. App. 1995) (holding that a regulatory commission should first interpret a utility regulation or tariff provision before a court considers the question).

rates and service” and that “[t]he only limitation on this authority is that it cannot litigate claims for unliquidated damages.”²³

Interpreting the Interim Water Service Agreement falls squarely within the Commission’s statutory authority. Such interpretation requires a review and interpretation of the provisions of Jessamine District’s filed tariff, the Commission’s regulations, and the provisions of KRS Chapter 278. The Commission routinely addresses questions of tariff interpretation. Moreover, as the agency that promulgated and enforces 807 KAR 5:066 – the Commission’s water extension regulation, the Commission is uniquely suited to determine whether Rule 26 and the Interim Water Service Agreement’s provisions are consistent with that regulation and thus enforceable.

Based upon our review of the pleadings, we find that the Commission has jurisdiction over the issues presented in the Complaint and that Jessamine District’s Motion to Dismiss should be denied.

We next turn to Jessamine District’s Motion to Hold in Abeyance. Jessamine District argues that the Commission should stay the current proceedings until “the Kentucky Court of Appeals, or higher appellate court, finally determines whether or not the PSC has the jurisdiction to hear the Complaint filed by Forest Creek.”²⁴ It argues that its appeal of the Jessamine Circuit Court Order dismissing its Petition for

²³ See, e.g., *Republic Corp. v. Kentucky Power Co.*, No. 87-CA-00523-MR, slip op. at 5-6 (Ky.Ct.App. June 10, 1988).

²⁴ Motion at 1.

Declaration of Rights directly affects the Commission's authority to proceed and the Commission's jurisdiction "is directly dependent upon the appellate court's decision."²⁵

The appeal pending before the Kentucky Court of Appeals is not determinative of the Commission's jurisdiction to hear the Complaint. It addresses only Jessamine Circuit Court's jurisdiction to adjudge Jessamine District's Declaration for Petition of Right. Jessamine Circuit Court did not address the Commission's authority to consider a complaint seeking an extension of water service. At the time the Circuit Court heard arguments on the Commission's motion to dismiss the Petition for Declaration of Rights, Forest Creek had yet to file its Complaint with the Commission.

Moreover, we note that the Jessamine Circuit Court proceeding was not far advanced. Only a petition and answer had been filed. No discovery had been conducted. No evidence had been taken. No arguments on the merits have been made. The Commission proceedings, therefore, will not be plowing old ground, nor will they be interfering with a court proceeding that is well under way. In this respect, the case before us is unlike those to which Jessamine District refers in its Motion to Hold in Abeyance.²⁶

Having carefully considered the motion, we find no reason to hold this proceeding in abeyance. We further find that this matter should be scheduled for a hearing and that a procedural schedule should be established to allow the parties an opportunity to conduct discovery and submit written testimony.

²⁵ *Id.* at 2.

²⁶ *Id.*

IT IS THEREFORE ORDERED that:

1. Jessamine District's Motion to Dismiss is denied.
2. Jessamine District's Motion to Hold In Abeyance is denied.
3. The procedural schedule set forth in the Appendix to this Order shall be followed.
 - a. All responses to requests for information shall be appropriately bound, tabbed and indexed and shall include the name of the witness who will be responsible for responding to the questions related to the information provided, with copies to all parties of record and eight copies to the Commission.
 - b. Each response shall be under oath or, for representatives of a public or private corporation or a partnership or association or a governmental agency, be accompanied by a signed certification of the preparer or person supervising the preparation of the response on behalf of the entity that the response is true and accurate to the best of that person's knowledge, information, and belief formed after a reasonable inquiry.
 - c. A party shall make timely amendment to any prior response if it obtains information that indicates that the response was incorrect when made or, though correct when made, is now incorrect in any material respect.
 - d. For any request to which a party fails or refuses to furnish all or part of the requested information, that party shall provide a written explanation of the specific grounds for its failure to completely and precisely respond.
4. Any party that files written testimony shall file with the Commission an original and eight copies. Written testimony shall be in verified form.

5. The parties shall consider any request for information from Commission Staff as if ordered by the Commission.

6. Service of any document or pleading in paper form shall be made in accordance with 807 KAR 5:001, Section 3(7). Service upon a party shall be considered completed upon delivery of the document or pleading to the party or upon mailing the document or pleading to the party's address of record.

7. Any party filing a document or pleading with the Commission shall serve such document or pleading upon all other parties to this proceeding.

8. Any document or pleading that a party serves upon the other parties to this proceeding shall also be filed with the Commission.

9. At any hearing in this matter, neither opening statements nor summarization of direct or rebuttal testimony shall be permitted.

10. Direct examination of witnesses shall be limited to the authentication and adoption of that written testimony. No summarization of written testimony by the witness shall be permitted.

11. Witnesses who have filed written direct and rebuttal testimony shall present that testimony at the same sitting. Opposing parties may cross-examine such witnesses on both direct and rebuttal testimonies.

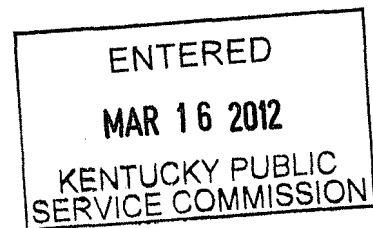
12. Motions for extensions of time with respect to the schedule herein shall be made in writing and will be granted only upon a showing of good cause.

13. Pursuant to KRS 278.360, the record of the formal hearing in this matter shall be by videotape.

14. Briefs shall not exceed 40 pages in length. When referring to a segment of the digital video record in its brief, a party shall set forth the month, day, year, hour, minute, and second at which the reference begins, as recorded on the digital video record (e.g., VR: 08/10/10; 14:24:05).

15. Commission Staff shall make a written exhibit list and shall file this list with the Commission with all exhibits and a copy of the video transcript of the hearing.

By the Commission



ATTEST:

Carroll D. Greenwell for
Executive Director

APPENDIX

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE
COMMISSION IN CASE NO. 2011-00297 DATED **MAR 16 2012**

Parties may file initial requests for information with the Commission
and served upon opposing parties no later than 03/30/2012

Parties' response to initial requests for information shall be filed with the
Commission and served upon opposing parties no later than 04/13/2012

Parties may file supplemental requests for information with the
Commission and served upon opposing parties no later than 04/27/2012

Parties' response to supplemental requests for information shall be filed with
the Commission and served upon opposing parties no later than 05/11/2012

Forest Creek shall file with the Commission the written testimony
of its witnesses, in verified form, no later than 05/25/2012

Requests for information to Forest Creek shall be filed with the Commission
and served upon Forest Creek no later than 06/08/2012

Forest Creek's responses to requests for information shall be filed with the
Commission and served upon all parties no later than 06/22/2012

Jessamine District shall file with the Commission the written testimony
of its witnesses, in verified form, no later than 07/06/2012

Requests for information to Jessamine District shall be filed with the
Commission and served upon Jessamine District no later than 07/20/2012

Jessamine District's responses to supplemental requests for information
shall be filed with the Commission and served upon all parties no later than .. 08/03/2012

Forest Creek shall file rebuttal testimony, in verified form, no later than 08/17/2012

An informal conference shall be held at the Commission's offices in
Frankfort, Kentucky for the purpose of considering the possibility of
settlement, the simplification of issues, and any other matters that may
aid in the handling or disposition of this case, beginning at 10:00 a.m.,
Eastern Daylight Time, on 08/29/2012

Public Hearing is to begin at 10:00 a.m., Eastern Daylight Time, in Hearing Room 1 of the Commission's offices at 211 Sower Boulevard, Frankfort, Kentucky, for the purpose of cross-examination of witnesses 09/05/2012

Written Briefs, if any, shall be filed with the Commission no later than 10/05/2012

Diana Clark
Office Manager
Jessamine-South Elkhorn Water District
P. O. Box 731
Nicholasville, KY 40340-0731

Honorable Robert C Moore
Attorney At Law
Hazelrigg & Cox, LLP
415 West Main Street
P.O. Box 676
Frankfort, KENTUCKY 40602