



STOLL · KEENON · OGDEN
PLLC

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

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

June 7, 2011

RE

HAND DELIVERED

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

JUN 07
PUBLIC SERVICE
COMMISSION

Re: *Forest Hills, et al v. Jessamine South Elkhorn Water District*
Case No. 2011-00138

Dear Mr. Derouen:

Please find enclosed for filing an original and ten copies of the Response of the Complainants to the Defendant's Motion to Dismiss in the above-captioned case. Please place this pleading in the file and bring it to the attention of the Commission. Thanks in advance for your assistance.

Sincerely,

Robert M. Watt, III

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

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED
JUN 07 2011
PUBLIC SERVICE
COMMISSION

In the Matter of:

FOREST HILLS RESIDENTS')
ASSOCIATION, INC. and)
WILLIAM BATES)
)
COMPLAINANTS)
)
VS.)
)
JESSAMINE SOUTH ELKHORN)
WATER DISTRICT)
)
DEFENDANT)

CASE NO.
2011-00138

* * * * *

COMPLAINANTS' RESPONSE TO MOTION TO DISMISS

Complainants, Forest Hills Residents' Association, Inc. ("Forest Hills") and William Bates, respectfully submit this response to the Motion to Dismiss of the Defendant, Jessamine South Elkhorn Water District ("Water District"). For the reasons set forth below, the Motion to Dismiss is without merit and should be denied.

The Water District relies on the statements in its Answer in support of its Motion to Dismiss the Complaint herein. There the Water District sets forth the following assertions: (i) the Commission is without jurisdiction under KRS 278.260 to consider the Complaint; (ii) Complainants have no standing; (iii) the Commission's consideration of the Complaint would be premature; (iv) the relief requested in the Complaint is contrary to 807 KAR 5:066, § 4(4); and (v) the factual allegations of the Complaint are incomplete and inaccurate. The Water District's assertions do not support dismissal.

The Complaint arises out of the decision of the Water District to construct a one million gallon above ground water storage tank on a tract of land (called the Switzer Site by the Water District) directly adjacent to Forest Hills subdivision in Jessamine County, Kentucky. In its Answer, the Water District states that it acquired the Switzer Site in May of 2004, which was prior to the development of Forest Hills subdivision. According to information supplied by the Water District to the Complainants, the tank will be approximately 169 feet tall and 39 feet in diameter. According to the Water District, the tank is being proposed in order to help the Water District to meet increased water usage and to comply with the requirements of 807 KAR 5:066, § 4(4), which requires water systems to have a minimum storage capacity equal to their average daily consumption. Therefore, the tank will be placed in service for the benefit of all customers of the Water District and not just those customers residing in Forest Hills subdivision.

The Complainants asked the Water District to consider another location for the tank beginning in the spring of 2010, when Complainants first learned of the plans to place a water tank next to their homes. Rather than investigate other possible locations for the tank, the Water District required the Complainants not only to suggest alternative sites, but also to purchase the sites, donate them to the Water District and pay the Water District sums it claimed were necessary to fund increased construction costs attendant to the alternative sites.¹ Not realizing that they were not required to do the Water District's job, Complainants attempted to find an alternative site for the tank. The first proposal was rejected. The second proposal was only acceptable on the condition that Forest Hills agree to the onerous terms set forth in the letter from the Water District's attorney, which is attached to the Complaint as Exhibit A. Those terms included posting a \$250,000 letter of credit and ultimately paying an estimated \$279,400 in so-

¹ The situation brings to mind Bizarro World in the Superman comics in which everything is the opposite of the way it should be. *See, also*, "The Bizarro Jerry," "Seinfeld," October 3, 1996.

called increased construction costs. Needless to say, the Complainants did not agree to those unduly onerous and unreasonable terms. Instead, they filed their Complaint in this proceeding seeking the Commission's assistance in causing the Water District to carry out its duties as a public utility in a reasonable manner.

Jurisdiction.

The Complaint was filed pursuant to the provisions of KRS 278.260 and KRS 278.280.

The first section provides as follows:

The commission shall have original jurisdiction over complaints as to rates or service of any utility, and upon a complaint in writing made against any utility by any person that any rate in which the complainant is directly interested is unreasonable or unjustly discriminatory, or that any regulation, measurement, practice or act affecting or relating to the service of the utility or any service in connection therewith is unreasonable, unsafe, insufficient or unjustly discriminatory, or that any service is inadequate or cannot be obtained, the commission shall proceed, with or without notice, to make such investigation as it deems necessary or convenient.²

The second section provides as follows:

Whenever the commission, upon its own motion or upon complaint as provided in KRS 278.260, and after a hearing had upon reasonable notice, finds that the rules, regulations, practices, equipment, appliances, facilities or service of any utility subject to its jurisdiction, or the method of manufacture, distribution, transmission, storage or supply employed by such utility, are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the commission shall determine the just, reasonable, safe, proper, adequate or sufficient rules, regulations, practices, equipment, appliances, facilities, service or methods to be observed, furnished, constructed, enforced or employed, and shall fix the same by its order, rule or regulation.³

² KRS 278.260(1).

³ KRS 278.280(1).

The Commission has found that it has jurisdiction over complaints against water districts.⁴ It said:

Water districts are public utilities and are “subject to the jurisdiction of the Public Service Commission in the same manner and to the same extent as any other utility.” KRS 278.015. The Commission has “exclusive jurisdiction over the regulation of rates and service of utilities.” KRS 278.040(2). It further has primary and exclusive jurisdiction over complaints as to rates and service of any utility.” KRS 278.260(1).⁵

The Commission went on to say, “‘Service’ encompasses the technical processes and practices which a utility uses to deliver service to the customer. . . .”⁶ Here we are dealing with the selection of a site on which to construct a large utility facility used to deliver service to all the customers of the Water District. The planned construction of the water tank thus involves the service of the Water District. The Complainants allege that the Water District’s practices in connection with the site selection are unreasonable. Thus, the Commission’s jurisdiction to hear the Complaint is conferred by KRS 278.260(1). Moreover, its authority to issue orders rectifying unreasonable practices is conferred by KRS 278.280(1). The present situation falls within the Commission’s statement in 1989, when it observed that “[t]he Commission’s authority to regulate both [water] districts as jurisdictional utilities, and to act consistent with the public interest, mandate further inquiry into the acts complained of”⁷

Standing.

The Water District’s second assertion is that the Complainants do not have standing to bring this action. There is no support for the assertion in the Answer, so it is difficult to understand why the Water District believes that the Complainants do not have standing. As

⁴ *In the Matter of: Daut and Rusconi v. Boone County Water District*, Case No. 97-056, Order of October 9, 1997.

⁵ *Id.* at 4.

⁶ *Id.* at 5.

⁷ *In the Matter of: City of Newport v. Campbell County Kentucky Water District and Kenton County Water district No. 1*, Case No. 89-014, Order of May 31, 1989, at 3-4.

indicated on the aerial photograph attached to the Answer as Exhibit A, the Switzer Site and one of the lots in Forest Hills subdivision have a common boundary. In other words, if the water tank happened to fall over, it could fall on the house located on the lot. This is not unlike the situation in which the Commission routinely permits intervention in electric transmission CPCN cases by persons over whose land the proposed line will cross.⁸ Thus, Mr. Bates, as an individual lot owner in Forest Hills subdivision,⁹ is affected by the proposed construction and has standing to bring this Complaint. Forest Hills, as the representative of all the lot owners in the subdivision, also has standing to bring this Complaint. In 2006, the Commission found that Constellation New-Energy-Gas Division, LLC had standing to file a complaint on behalf of its customers against Columbia Gas of Kentucky, Inc.¹⁰ Similarly, in 1999, the Commission found that Kentucky Industrial Utility Customers, Inc. had standing to file complaints against Louisville Gas and Electric Company and Kentucky Utilities Company on behalf of its members, who were industrial customers of both utilities.¹¹ Since all the lot owners in the subdivision have standing on the same basis as Mr. Bates, Forest Hills, as their representative, has standing as well.

Prematurity.

The Water District's third assertion is that the Commission's consideration of the Complaint would be premature. Again, the Water District offers no support for this assertion in its Answer, so the Complainants (and the Commission) are left to guess why the Water District

⁸ See, e.g., *In the Matter of: The Application of East Kentucky Power Cooperative, Inc. for a Certificate of Public Convenience and Necessity to Construct a 161 kV Transmission Line in Barren, Warren, Butler and Ohio Counties, Kentucky*, Case No. 2005-00207, Order of October 31, 2005 at 2.

⁹ Mr. Bates does not own the lot with the common boundary with the Switzer Site.

¹⁰ *In the Matter of: Constellation New-Energy-Gas Division, LLC v. Columbia Gas of Kentucky, Inc.*, Case No. 2005-00184, Order of July 12, 2006, at 6.

¹¹ *In the Matter of: Kentucky Industrial Utility Customers, Inc. v. Louisville Gas and Electric Company and Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Company*, Case Nos. 99-082 and 99-083, Order of April 13, 1999, at 5.

believes the Complaint is premature. Perhaps the Water District believes that objections to the proposed site of the tank should be addressed in a certificate of public convenience and necessity (“CPCN”) proceeding. As discussed below, the Water District is not entitled to a CPCN for the construction of a tank on the Switzer Site.

Before it may begin construction of the tank, the Water District must obtain a CPCN. In order to obtain a CPCN for the construction of new facilities, a utility must prove that the public convenience and necessity require the construction. KRS 278.020(1).¹² There is a serious question about the need for a one million gallon tank. According to the Water District, it has two existing tanks with storage capacity of 550,000 gallons and average daily usage of 760,000 gallons.¹³ The proposed tank is five times larger than the shortfall. In addition, in Case No. 2006-00156, the Water District sought approval of a system development charge to pay for a one million gallon above-ground storage tank, but the proceeding was dismissed for failure to comply with the Commission’s filing requirements.¹⁴ Prior to dismissal, the Water District appeared at an informal conference at the Commission. The Commission’s Intra-Agency Memorandum of the informal conference in the case dated May 3, 2006, notes, “Staff’s position is that the present [capital improvement plan] filed in the application was long on history and short on future projections as to growth and need.”

The other part of a CPCN proceeding is the consideration of the public convenience, which includes the propriety of the location of the proposed facilities. In determining whether a particular location for new facilities is appropriate, the Commission has relied on the seminal

¹² Since the Water District says in its Answer that it will not enter an agreement with the United States Department of Agriculture for financing, KRS 278.020 and not KRS 278.023 applies.

¹³ Answer, footnote 1.

¹⁴ *In the Matter of: Application of Jessamine South Elkhorn Water District for Approval of a System Development Charge Pursuant to 807 KAR 5:090*, Case No. 2006-00156, Order of July 28, 2008.

decision of the Kentucky Court of Appeals in *Kentucky Utilities Company v. Public Service Commission*.¹⁵ There the court said,

It is our opinion that the case should be remanded to the Public Service Commission for a further hearing addressed to the question of duplication from the standpoint of an excessive investment in relation to efficiency, and from the standpoint of 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.¹⁶

Applying the foregoing principles to CPCN applications in 2005, the Commission found that three utilities had not conducted sufficient analyses of alternative routes for electric transmission lines and denied their applications for CPCNs.¹⁷ Interestingly, in Case No. 2005-00154, a witness for the intervening landowners identified an alternative route for the proposed line that would cost an additional \$1.84 million to construct.¹⁸ It was not suggested that the intervening landowners should pay that additional cost of construction if the suggested route had been chosen.

In its Answer, the Water District argues that it conducted a reasonable evaluation¹⁹ of alternative locations for the tank site. Unfortunately, all the analyses occurred between 2001 and 2003, when the agreement to acquire the Switzer Site was made. Now, in 2011, when the Water District says it wants to construct the tank, conditions have changed significantly. What may have been reasonable in 2003, when the Switzer Site was in the interior of Ms. Switzer's farm, is

¹⁵ 252 S.W.2d 885 (Ky. 1952).

¹⁶ *Id.* at 892.

¹⁷ *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*, Case No. 2005-00089, Order of November 9, 2005; *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*, Case No. 2005-00142, Order of September 8, 2005; *In the Matter of: Application of Kentucky Utilities Company for a Certificate of Public Convenience and Necessity for construction of Transmission Facilities in Anderson, Franklin, and Woodford Counties, Kentucky*, Case No. 2005-00154, Order of September 8, 2005.

¹⁸ Case No. 2005-00154, Order of September 8, 2005, at 7.

¹⁹ Complainants do not concede that the evaluation was reasonable.

not reasonable today, when it is connected to a residential subdivision. The Water District's refusal to conduct any additional evaluation, or, indeed, to even seriously consider suggested alternative sites, is manifestly unreasonable in light of the governing authorities.

Before the Water District may begin construction, it must prove to the satisfaction of the Commission that public convenience and necessity require the construction. It appears that it cannot do that. In any event, the Water District places the propriety of the site selection squarely before the Commission in this proceeding when it asks, at page 15 of the Answer, for "approval of the Switzer site as the location for the tank." Thus, this proceeding is not premature because the Commission can issue an order pursuant to KRS 278.280(1) requiring the Water District to utilize reasonable practices in connection with its proposed water storage tank, including the determination of its necessity, the use of a reasonable site evaluation process and the selection of a reasonable site.

807 KAR 5:066, § 4(4).

The Water District's fourth assertion is that the relief requested in the Complaint is contrary to 807 KAR 5:066, § 4(4). That administrative regulation simply requires the Water District to have adequate storage capacity. Nothing in the Complaint would prevent the Water District from having adequate storage capacity. The issue is the necessity for and location of the storage capacity, not the adequacy of existing storage capacity.

Incomplete and Inaccurate Allegations.

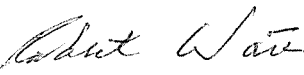
The final assertion in the Answer is that the factual allegations of the Complaint are incomplete and inaccurate. Of course, the Complainants disagree with that assertion. The Water District will have an opportunity during a hearing in this proceeding to try to prove this assertion. It is not grounds for dismissal of the Complaint.

Conclusion.

For all of the foregoing reasons, the Water District's Motion to Dismiss should be denied.

Respectfully submitted,

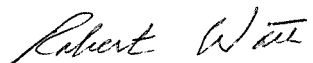
Robert M. Watt, III
Monica H. Braun
Stoll Keenon Ogden PLLC
300 West Vine Street, Suite 2100
Lexington, Kentucky 40507
8598-231-3000
robert.watt@skofirm.com
monica.braun@skofirm.com

By: 
Counsel for Complainants

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 7th day of June 2011:

Bruce E. Smith, Esq.
Bruce E. Smith Law Offices, PLLC
201 South Main Street
Nicholasville, Kentucky 40356
bruce@smithlawoffice.net


Counsel for Complainants