

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the matter of:

FOREST CREEK, LLC  
COMPLAINANT

vs.

JESSAMINE- SOUTH ELKHORN WATER DISTRICT  
DEFENDANT

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) Case No. 2011-00297  
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**MEMORANDUM OF FOREST CREEK LLC, IN OPPOSITION TO SOUTH ELKHORN WATER DISTRICT’S MOTIONS FOR REHEARING/RECONSIDERATION, TO STAY PROCEDURAL SCHEDULE AND/OR TO BIFURCATE AND/OR MODIFY PROCEDURAL SCHEDULE TO PROVIDE FOR INFORMAL CONFERENCE**

Comes Forest Creek, LLC (“Forest Creek”), by counsel, and for its Memorandum in Opposition to Jessamine - South Elkhorn Water District’s (“Water District”) Motion for Rehearing/Reconsideration, To Stay Procedural Schedule and/or To Bifurcate and/or Modify Procedural Schedule To Provide For Informal Conference, states as follows.

**I. The Water District’s Motion for Rehearing/Reconsideration Should be Denied Because No Hearing Has Been Held and No Additional Evidence Was Offered.**

The Water District filed its Motion for Rehearing/Reconsideration pursuant to KRS 278.400. (See Water District’s Motion, p. 1). However, the Water District’s motion should be denied; 1) because there was no hearing resulting in a determination from which a request for reconsideration could be made, and 2) the Water District offers no new additional evidence that could not with reasonable diligence have been offered at the hearing. The relevant language of KRS 278.400 provides that:

After a determination has been made by the commission in any hearing, any party to the proceedings may, within twenty (20) days after the service of the order, apply for a hearing with respect to any of the matters determined. . . . Upon the rehearing any party may offer additional evidence that could not with reasonable diligence have been offered on the former hearing.

As the Commission is aware, the hearing has not yet been held in this case. Therefore, no determination has been made by the Commission “in any hearing”, and KRS 278.400 does not authorize the Water District to file its Motion for Rehearing/Reconsideration in this case. For this reason alone, its motion for rehearing should be denied.

KRS 278.400 further states that “Upon the rehearing any party may offer additional evidence that could not with reasonable diligence has been offered on the former hearing.” The Water District fails to cite the Commission to any additional evidence that could not with reasonable diligence have been offered to the Commission in support of its motion to dismiss this proceeding. Instead, it merely “repackages” arguments previously rejected by the Commission. Accordingly, the Water District’s motion for Rehearing/Reconsideration should be denied for this reason as well.

## **II. KRS 278.260 Grants the Commission Original Jurisdiction Over Forest Creek's Complaint.**

The relevant language of KRS 278.260(1) provides that:.

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

Pursuant to this statute, and as confirmed by the court in Smith v. Southern Bell Tel. Co., 268 Ky 421, 104 S.W.2d 961, 963 (Ky. 1937)," the primary jurisdiction and authority to fix rates,

establish reasonable regulation of service and to alter and make changes to set regulations and to make investigation as to any change in service . . . is exclusively and primarily in the Commission. . . .” The fact that the Commission argued on August 11, 2010, its Motion to Dismiss the Civil Action 10-CI-1394 pending in the Jessamine Circuit Court, and Forest Creek filed the above-styled action on August 5, 2011, does not affect in any way affect the Commission’s exclusive jurisdiction over this matter. Nor does the fact that preliminary procedural motions addressing intervention and jurisdiction were filed in the Jessamine Circuit Court action affect the Commission’s exclusive jurisdiction over this matter. Accordingly, the Water District’s Motion for Rehearing/Reconsideration must be denied.

The Water District recycles its argument that the appeal of the Jessamine Circuit Court case pending before the Court of Appeals will be determine whether the Commission has the jurisdiction to hear Forest Creek's complaint. The Commission has rejected this argument once and should do so again. The plain language of KRS 278.260, and the cases interpreting this statute, establish that the Commission has original jurisdiction over Forest Creek's complaint. To support its motion, the Water District cites the Commission to the case of Jackson Energy Cooperative Corporation v. Booneville Cable Vision, et al., PSC Case No. 2009-00391. This case involved a complaint filed by a utility against two cable TV companies that were not utilities within the meaning of 278.010(3). The Commission properly held that it did not have jurisdiction to adjudicate a complaint brought by a jurisdictional utility against a customer for non-compliance with its tariff requirements, whether such noncompliance be nonpayment of a utility bill or, the failure to abide by the provisions of a tariff. Of course, the decision in Jackson provides no support for the Water Districts argument that the Commission does not have exclusive jurisdiction in this case, as Jackson did not involve a complaint filed by a customer

against a jurisdictional utility. Again, KRS 278.260 expressly provides that the Commission has original jurisdiction over such a complaint. It cannot be validly argued that the Commission does not have original jurisdiction over Forest Creek's complaint, which includes the issue of the enforceability of the Interim Service Water Agreement and Rule 26. If the Water District did not comply with the requirements of KRS Chapter 278 and 807 KAR 5:011 in creating the Interim Service Water Agreement and Rule 26, then the agreement and the rule are unenforceable.

The Water District also argues that the dismissal of the Jessamine Circuit Court action deprives it of its due process rights. However, during this proceeding, the Water District will certainly have the opportunity to attempt to establish that the Interim Water Service Agreement and Rule 26 comply with the above cited statutes and regulations, thereby avoiding any due process issues.

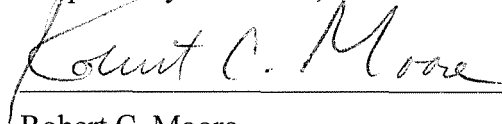
Finally, the Water District fails to cite the Commission to any valid reason for holding this proceeding in abeyance or bifurcating this proceeding. In fact, delaying this hearing will merely result in more injury to Forest Creek, the Water District's customer. Should the Commission wish to schedule an Informal Conference in this case, it can do so without holding the matter in abeyance or bifurcating same. Therefore, the Water District's request to hold this matter in abeyance or to bifurcate this proceeding should also be denied.

### **Conclusion**

In conclusion, the Commission should deny the Water District's motions based on the fact that no determination was made in a hearing that could support the filing of a motion for rehearing/reconsideration, the Water District failed to any offer additional evidence that could not with reasonable diligence have been offered in its previous filings, and KRS 278.260 clearly

provides the Commission with exclusive original jurisdiction over this proceeding. Furthermore, it fails to cite the Commission to any valid reasons supporting holding this matter in abeyance or bifurcating same.

Respectfully submitted,



Robert C. Moore

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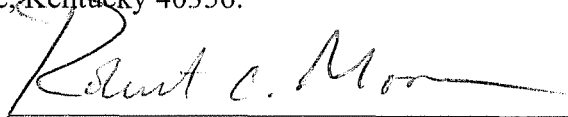
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Counsel for Forest Creek, LLP

#### CERTIFICATE OF SERVICE

<sup>RCM</sup>  
<sup>26th</sup> I hereby certify that the foregoing was served by first class mail, postage prepaid, this the <sup>26th</sup> day of <sup>March</sup>, 2012, to, Hon. Bruce E. Smith, **BRUCE E. SMITH LAW OFFICES, PLLC**, 201 South Main Street, Nicholasville, Kentucky 40356.



Robert C. Moore