STOLL
KEENON
OGDEN

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

MONICA H. BRAUN
DIRECT DIAL: (859) 231-3903
Monica.Braun@skofirm.com

April 3, 2013

HAND DELIVERED

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

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. 2012-00470**

Dear Mr. Derouen:

Enclosed please find and accept for filing the original and ten copies of Forest Hills Residents' Association, Inc.'s and William Bates' 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

Monica H. Braun

Enclosure
cc: Counsel of Record (w/encl.)

RECEIVED

APR 03 2013

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 CONSTRUCT AND FINANCE A WATERWORKS IMPROVEMENT PROJECT PURSUANT TO KRS 278.020 AND 278.300	)	**CASE NO. 2012-00470**

FOREST HILLS RESIDENTS' ASSOCIATION, INC.'S AND WILLIAM BATES'

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 one million gallon elevated storage tank should be denied because the request is based upon a fundamental misunderstanding of the Commission's minimum storage requirement, supported by demand projections that are, at best, incomplete. The Water District's application, responses to data requests, and the testimony of its witnesses at the hearing cumulatively fail to satisfy the burden of proof mandated by KRS 278.020. In fact, the evidence demonstrates that (1) the tank is not needed; (2) constructing the tank will cause wasteful duplication; (3) the Water District failed to consider other alternatives for storage; (4) the Water District's selected site, as well as its site selection process, is unreasonable; and (5) the Water District treated Forest Hills Residents' Association, Inc. and William Bates (collectively, "Intervenors"), unreasonably throughout the Intervenors' two-year effort to demonstrate to the Water District that its proposed site is unacceptable. 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 one million gallon elevated storage tank ("Switzer site") in 2003,[1] which has remained vacant. After the purchase in 2004, the area immediately adjacent to the Switzer site was developed into a residential subdivision, known as the Forest Hills Estates Subdivision ("Forest Hills").[2] 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.[3]

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") on April 7, 2010 to demonstrate to the Water District that the Switzer site was an unacceptable location for the tank.[4] Over the next year, Forest Hills proposed two alternate sites to the Water District, each of which was rejected.[5] 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.[6]

Forest Hills continued its efforts to work with the Water District until it received a contract on March 11, 2011 from the Water District's counsel that contained onerous requirements, including posting a $250,000 irrevocable letter of credit within twelve days in the

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[1] See Water District's Application, Exhibit A at unnumbered first page.
[2] See Water District's Answer in Case No. 2011-00138 at p. 3.
[3] See Intervenors' Complaint in Case No. 2011-00138 at ¶4; 3/14/13 Hearing Transcript at 10:37:10-10:37:53.
[4] 3/14/13 Hearing Transcript at 10:37:53-10:38:22.
[5] See generally the direct testimony of William Bates and T. Logan Davis at hearing on 3/14/13.
[6] 3/14/13 Hearing Transcript at 10:44:50-10:45:12.

Water District's name, in order for the Water District to consider utilizing an alternate site.[7] Following receipt of the letter, the Intervenors filed a complaint against the Water District on April 15, 2011 at the Commission because of the Water District's unreasonable conduct.[8]

The Water District filed an application requesting a CPCN on October 16, 2012. On October 26, 2012, the Intervenors moved to intervene, which motion was granted on November 5, 2012. On November 9, 2012, the Intervenors moved for a procedural schedule that permitted discovery and a hearing in this matter. The Water District objected, arguing that several deadlines with respect to the project would be delayed if a hearing occurred.[9] The Commission issued a procedural schedule that allowed for expedited review of the application, with two rounds of discovery and a hearing.[10] The Commission's order stated the schedule would allow a final decision to be rendered on or about February 1, 2013, with a hearing scheduled for January 10, 2013.[11] On January 7, 2013, the Water District moved to postpone the hearing to investigate the alternate sites the Intervenors had suggested in discovery and to discuss the possibility of settlement.

The Commission granted the motion to postpone and the hearing was rescheduled for March 13, 2013.[12] The hearing occurred on March 13 and 14, 2013, with Nick Strong; John Horne; Christopher Horne; Glenn Smith; and William Berkley testifying on behalf of the Water District and William Bates; T. Logan Davis; Clark Toleman; and Michael Ritchie testifying for the Intervenors. This brief is filed pursuant to the schedule established at the conclusion of the hearing and the Commission's March 22, 2013 order.

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[7] See Exhibit JSEWD-Strong 4.
[8] See generally Intervenors' Complaint in Case No. 2011-00138.
[9] See Water District's November 16, 2012 Response to Motion for Hearing.
[10] The Commission entered the procedural schedule on November 27, 2012. It was subsequently amended.
[11] Id.
[12] The Commission's order was entered on January 31, 2013.

III. ARGUMENT

A. The Water District's Request for a CPCN Should Be Denied.

The Water District cannot commence construction of the water tank absent a CPCN from the Commission, as KRS 278.020(1) states:

> 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 that: (1) there is a need for the proposed facility or service; and (2) the new facility will not create wasteful duplication.[13] "Need" requires the utility to prove "a substantial inadequacy of existing service" due to a deficiency of service facilities beyond what could be supplied by normal improvements in the ordinary course of business.[14] Preventing "wasteful duplication" means not only preventing a physical multiplicity of facilities, but avoiding "excessive investment in relation to productivity or efficiency."[15] 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.

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[13] Kentucky Utilities Co. v. Public Service Commission, 252 S.W.2d 885, 890 (Ky. 1952).
[14] Id.
[15] Id.

B. The Proposed Water Tank Is Not Needed.

i. The Water District Does Not Need an Additional One Million Gallons of Storage Capacity to Comply with 807 KAR 5:066, Section 4(4).

The threshold burden of proof the Water District must establish is that it needs a one million gallon storage tank to serve its customers in the northwest service area. The Water District did not meet its burden because recent customer usage and hydraulic analyses demonstrate that an additional one million gallons of water storage is not needed and, in fact, cannot be utilized on an average day without risking serious water quality degradation concerns.

The Water District did not address "need" in its application. With respect to increasing its storage capacity by one million gallons, the Water District has based its entire case on complying with 807 KAR 5:066, Section 4(4),[16] which states: "The minimum storage capacity for systems shall be equal to the average daily consumption." Presently, the Water District has 550,000 gallons of water storage in its northwest service area in an elevated storage tank capable of holding approximately 50,000 gallons and a second storage tank with an approximate capacity of 500,000 gallons.[17]

Throughout the proceeding, the Water District has interpreted "average daily consumption" incorrectly, equating it to either (1) average monthly daily consumption; or (2) maximum monthly daily consumption.[18] The regulation clearly states that the storage requirement is premised upon ***average*** daily use; maximum use – whether computed daily, monthly, or annually – is irrelevant to complying with 807 KAR 5:066, Section 4(4). The Water District argues that the Commission, in an order allowing Kentucky-American Water Company ("KAWC") to construct a water treatment facility, defined a water utility's obligation

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[16] See Water District's Application, Exhibit A at unnumbered second page.
[17] See id.; CIP at page 6.
[18] Water District's Application, Exhibit A at unnumbered second page; 3/13/13 Hearing Transcript at 15:50:20-15:55:02.

to provide "adequate service" as having sufficient capacity to meet maximum estimated demands.[19] The KAWC order the Water District references pertains to an adequate source of supply, not adequate storage capacity.[20] The order references 807 KAR 5:066, Section 10(4), which states, "Water supply requirements. The quantity of water delivered to the utility's distribution system from all source facilities shall be sufficient to supply adequately, dependably and safely the total reasonable requirements of its customers under ***maximum*** consumption."[21] The source of supply regulation differs from the storage capacity regulation, which references ***minimum*** storage capacity based upon ***average*** daily use.[22]

The most comparable calculation the Water District relied on is the average *monthly* daily use, which demonstrates that from August 2011 to July 2012, customer usage was largely within the Water District's storage capacity for six of the twelve months, and the average monthly daily use for the year was 709,200 gallons,[23] which is 128% of the Water District's current storage capacity, exceeding the current capacity by 159,200 gallons. The tank the Water District has proposed is over ***six times*** that size. Based upon documents produced in discovery, the Water District's average *annual* daily use fell between 93% and 125% of its storage capacity from 2006 to 2010.[24] In two of those years, the Water District's average annual daily use was below its current storage capacity,[25] further proving that the Water District does not need to more than double its existing capacity.

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[19] Water District's Response to Item No. 27 of the Intervenors' Supplemental Requests for Information.
[20] Case No. 2007-00134, In the Matter of: The Application of Kentucky-American Water Company for a Certificate of Public Convenience and Necessity Authorizing the Construction of Kentucky River Station II, Associated Facilities and Transmission Main (Ky. PSC April 25, 2008).
[21] (emphasis added).
[22] 807 KAR 5:066, Section 4(4).
[23] See Water District's Application, Exhibit A at unnumbered second page.
[24] See Water District's Response to Item No. 16 of the Intervenors' Supplemental Requests for Information.
[25] Id.

ii. The Water District's Demand Forecasts Are Incomplete.

When asked at the hearing why the Water District seeks to increase its storage capacity by one million gallons when its average monthly use is only 159,200 gallons above its current storage capacity, witness John Horne, an engineer who performs services for the Water District, alleged that the one million gallons is needed for future growth.[26] Despite this claim, Mr. Horne was unable to explain how much of the capacity in the proposed tank is allocated to future growth.[27] While the Water District claims that the additional storage capacity is necessary for its growing customer base, the Water District failed to provide future demand projections that supported its claim. The Water District did not perform demand projections for this case and instead chose to rely on the projections in the Capital Improvement Program – System Storage ("CIP") document Mr. Horne prepared for the Water District in 2006.

The CIP was first used by the Water District in Case No. 2006-00156 when it requested approval to implement a System Development Charge for distribution improvements associated with the proposed one million gallon tank.[28] Following notification from the Commission that its application was deficient, the Water District attended an informal conference with Commission Staff to discuss the deficiencies.[29] The Commission Staff observed that "the present CIP filed in the application was long on history and short on future projections as to growth and need."[30] The Commission ultimately removed the case from its docket after the Water District failed to correct the deficiencies.[31]

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[26] 3/13/13 Hearing Transcript at 14:09:27-14:09:40.
[27] 3/13/13 Hearing Transcript at 16:11:20-16:12:39.
[28] In the Application in Case No. 2006-00156, the Water District stated that it had submitted an application for federal assistance with USDA Rural Development to borrow $2,150,000 for the purpose of building the tank.
[29] See April 21, 2006 letter from Michael Burford to Nick Strong;
[30] See May 3, 2006 Intra-Agency Memorandum from J.R. Goff describing the April 27, 2006 informal conference.
[31] See July 28, 2006 Order.

Despite the fact that Commission Staff cautioned the Water District that the CIP was inadequate with respect to future growth and storage needs, the Water District chose to rely on the CIP in this proceeding to demonstrate its need for the tank without addressing the Commission Staff's concerns or updating any of the information. In responding to the Intervenors' data requests, the Water District ultimately updated certain information in the CIP, but stated that the Water District "is under no obligation to update information contained in the CIP."[32]

The CIP claimed that the Water District's expected growth rate of fifty to sixty residential customers per year would not only continue, but "most likely increase at a higher rate."[33] For purposes of the CIP, the Water District utilized a growth rate of sixty residential meters per year.[34] When asked to provide actual residential customer growth from 2006 to 2012 in discovery, the Water District's figures demonstrated that the number of residential customer meters has only increased, on average, by 39.33 customers per year,[35] which is 35% below the projections in the CIP.

Not only has the Water District failed to realize the customer growth it expected, the future demand projections in the CIP are, at best, incomplete because the projections are based on insufficient data that failed to take into consideration significant variables.[36] Mr. Horne stated at the hearing that he calculated the future growth projections by selectively identifying six residential subdivisions, which according to the CIP, represented the "existing average, as well as more recent subdivisions which are indicative of the anticipated future demands within the

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[32] See Water District's Responses to the Intervenors' Supplemental Data Requests Item Nos. 22, 25, 26.
[33] CIP, p. 13.
[34] Id. at 19.
[35] Water District's Responses to the Intervenors' Supplemental Data Requests Item No. 22.
[36] Mr. Horne confirmed at the hearing that he had never performed a study similar to the CIP before performing the CIP in connection with Case No. 2006-00156. 3/13/13 Hearing Transcript at 14:05:44-14:06:02.

District."[37] To be clear, the demand projections in the CIP were based ***entirely*** on subjectively isolating these six subdivisions and examining their usage data. With a residential meter count of only roughly 2,000, demand projections should have been based on the system as a whole, instead of the sampling approach Mr. Horne utilized - especially when the criteria for selecting the six subdivisions in the proxy group were based solely on the fact that Mr. Horne believes these subdivisions "represent the anticipated growth" of the Water District.[38]

Just as concerning as the data on which the CIP is based is the data that was ***not*** considered. Mr. Horne confirmed at the hearing that his demand projections did not consider the effects of: (1) declining population growth; (2) declining usage per customer; (3) conservation; (4) leakage; or (5) non-revenue usage.[39] Mr. Horne also failed to perform an equalization analysis or analyze system vulnerability under a range of emergency scenarios.[40] Mr. Horne, in response to questions regarding the factual bases of his projections, declared at the hearing that predicting growth is nothing but an opinion.[41] In fact, Mr. Horne stated no less than three times that not only future growth, but sizing a water tank, is a matter of opinion.[42] The Intervenors, who stand to suffer irrevocable property damage, respectfully disagree.

When challenged as to why the variables listed above were not considered, Mr. Horne's responses were either unpersuasive or belied by the facts of the case. For example, when asked why the effects of water conservation were not factored into his demand forecasts, Mr. Horne claimed there was no conservation in the northwest service area because he had not seen any rain barrels or rain gardens.[43] When questioned whether he denied that the recently developed

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[37] CIP, p. 54.
[38] Id. at 65.
[39] 3/13/13 Hearing Transcript at 14:26:00-14:31:31.
[40] 3/13/13 Hearing Transcript at 14:31:31-14:31:42; 3/13/13 Hearing Transcript at 14:33:38-14:33:54.
[41] 3/13/13 Hearing Transcript at 14:19:55-14:19:05.
[42] Id.; 3/13/13 Hearing Transcript at 14:30:43-14:31:11; 3/13/13 Hearing Transcript at 16:12:20-16:12:39.
[43] 3/13/13 Hearing Transcript at 14:28:00-14:28:20.

subdivisions on which his CIP were based had installed water-efficient appliances, such as low-flow toilets, Mr. Horne conceded that they did.[44]

Similarly, when questioned as to why the CIP did not take into account non-revenue water, Mr. Horne stated that "there is very little non-revenue usage" in the Water District.[45] Commission Staff introduced exhibits demonstrating Mr. Horne's claim was inaccurate. The Water District's 2012 inspection report prepared by Commission Staff included a deficiency for unaccounted-for water loss because at 19.57%, the amount of water loss exceeded the 15% maximum allowed for ratemaking purposes in 807 KAR 5:066, Section 6(3).[46] The inspection report further stated that the Water District "should undertake an aggressive water loss prevention/leak detection program, driven by a written systematic plan."[47] The report stated that the Water District's average daily consumption for the year (for both the northwest and southeast service areas) was 754,487 gallons.[48] This means that the unaccounted-for water loss totaled 147,653 gallons, which is very comparable to the 159,200 gallon difference between the Water District's storage capacity and its average monthly daily use in the northwest area. Even if the Water District only reduced its unaccounted-for water loss to the maximum allowable limit of 15%, it would defray 34,480 gallons of water – 21.6% of the 159,200 gallon deficiency.

To summarize, the Water District failed to provide demand projections in this case and instead relied on the seven-year old CIP that the Commission Staff advised was deficient with respect to growth and need. In this case, it was discovered that the Water District has only averaged 65% of the growth predicted in the CIP from 2006 to 2012. In short, nothing in the CIP, which does not consider many of the most basic elements of a demand forecast, proves that

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[44] 3/13/13 Hearing Transcript at 14:29:00-14:29:18.
[45] 3/13/13 Hearing Transcript at 14:31:28-14:31:31.
[46] Staff Exhibit 2, August 7, 2012 Letter from George Wakim to Tom Smith and Nick Strong.
[47] Id.
[48] Id.

the Water District's current or future usage warrants more than doubling its existing storage capacity.

iii. The Water District Cannot Operate the Proposed Tank at Full Capacity Without Risking Significant Water Degradation Concerns.

On an average day, the Water District cannot fill the proposed tank anywhere near its one million gallon capacity thus risking serious water quality issues. In submitting information to the Kentucky Division of Water ("Division of Water") regarding the proposed tank, the Water District provided a hydraulic analysis that Christopher Horne, an engineer that performs services for the Water District, performed in September 2010.[49] The purpose of a hydraulic analysis is to determine how a system will operate if proposed infrastructure or equipment – here, the proposed tank – is added to the distribution system.[50]

The Water District submitted an Extended Period Simulation ("EPS") to the Division of Water that demonstrated how the distribution system would perform over a 72-hour period if the proposed tank was in operation.[51] The EPS shows how much water is being stored in each tank during every hour of the 72-hour simulation.[52] When the Water District initially submitted its EPS to the Division of Water in September 2010, the Division of Water found that all of the water in the proposed tank was not turning over within the 72-hour period.[53] If the water does not turn over within the 72-hour period, water quality degradation issues can occur.[54]

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[49] See the Water District's Response to Request No. 1 from Commission Staff; 3/14/13 Hearing Transcript at 9:10:00-9:12:39.
[50] 3/14/13 Hearing Transcript at 9:15:58-9:16:10.
[51] 3/14/13 Hearing Transcript at 9:11:15-9:11:42; see the Water District's Response to Request No. 1 from Commission Staff.
[52] See the Water District's Response to Request No. 1 from Commission Staff.
[53] 3/14/13 Hearing Transcript at 9:11:15-9:11:42; see the Water District's Response to Request No. 1 from Commission Staff.
[54] See, e.g., The Ten States Standards, § 7.0.1(c) (2003 ed.): "Excessive storage capacity should be avoided where water quality deterioration may occur."

Because of water quality concerns, the Division of Water required the Water District to submit a revised hydraulic analysis that proved that the Water District could operate the tank in such a manner that would permit all of the water in the tank to turn over within a 72-hour period.[55] In response, Christopher Horne performed a second hydraulic analysis in February 2011 in which he decreased the maximum storage elevation in the proposed tank from 1,170 to 1,154 feet, which means that when the amount of water stored in the tank reaches 1,154 feet, a telemetry control switch shuts off, resulting in no additional water being stored in the tank until the volume decreases.[56] Notes accompanying the hydraulic analysis explain that in reducing the maximum elevation, the maximum volume that could be stored in the tank was reduced to 604,515 gallons.[57]

In response to Item No. 1 of the Commission Staff's First Data Requests, the Water District submitted the results of three hydraulic analyses: (1) the September 2010 EPS; (2) the revised February 2011 EPS; and (3) an EPS from December 2012. During the hearing, Christopher Horne stated that he did not perform a third EPS in December 2012, and said that the EPS was a re-run of the February 2011 EPS.[58] Horne confirmed that the December 2012 EPS retained the reduced elevation of 1,154 feet for the proposed tank.[59]

During the 72-hour period in the December 2012 EPS, the maximum volume of water stored in the proposed tank was 630,802 gallons, which represented only 57.7% of the tank's capacity.[60] This further demonstrates that the proposed one million gallon tank is not needed because the Water District cannot utilize ***42%*** of the tank's volume on an average day. In terms

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[55] 3/14/13 Hearing Transcript at 9:11:15-9:11:42.
[56] 3/14/13 Hearing Transcript at 9:11:05-9:11:15; see the Water District's Response to Request No. 1 from Commission Staff.
[57] See the Water District's Response to Request No. 1 from Commission Staff.
[58] 3/14/13 Hearing Transcript at 9:12:14-9:15:32.
[59] 3/14/13 Hearing Transcript at 9:24:08-0:24:31.
[60] See the Water District's Response to Request No. 1 from Commission Staff, December 2012 EPS at 59.0000 hours.

of gallons, 463,230 gallons of storage cannot be utilized.[61] While the Water District may be able control the volume of the tank through telemetry, this argument is inapposite to whether the Water District has a need for an additional million gallons of water storage. The results of its own hydraulic analyses reveal it does not.

Not only can the Water District utilize a mere 57.7% of the capacity in the proposed tank, the hydraulic analyses also revealed that the existing 50,000 gallon tank will be completely empty approximately 75% of the time.[62] The EPS showed that from hours 7 to 53 in the 72-hour period, the 50,000 gallon tank was completely empty, and at no time during the EPS did the tank exceed 14.2% capacity, or 7,759 gallons.[63] Thus, if the Water District's application in this proceeding is granted it will have, on average: (1) a 50,000 gallon tank that is usually empty; and a (2) one million gallon tank that, at most, is only 57.7% full. Between the two tanks, at least 513,230 gallons of storage capacity will not be utilized. When the results of the hydraulic analyses are compared to the Water District's incomplete demand projections, it is apparent that the Water District has failed to establish that it needs an additional one million gallons of water storage.

iv. There Is Adequate Pressure in the Northwest Service Area.

To establish need, the Water District must be able to demonstrate there is "a substantial inadequacy of existing service" due to a deficiency of service facilities beyond what could be supplied by normal improvements in the ordinary course of business.[64] The Water District's testimony is clear: there are no low pressure issues in its northwest service area. As such, there is no substantial inadequacy of existing service.

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[61] See the Water District's Response to Request No. 1 from Commission Staff, December 2012 EPS at 59.0000 hours. The EPS states that the proposed tank can hold 1,094,032 gallons.
[62] See Intervenors' Exhibit IX-16.
[63] See Intervenors' Exhibit IX-16.
[64] Kentucky Utilities Co. v. Public Service Commission, 252 S.W.2d 885, 890 (Ky. 1952).

In its application, the Water District stated that "the District has been able to maintain flows and pressure through judicious pumping and system management."[65] In response to a Commission Staff data request, the Water District provided all of the customer complaints regarding low water pressure in the northwest service area since January 1, 2009, which totaled ten.[66] During the hearing, Glenn Smith, superintendent of the Water District, confirmed that none of the complaints revealed there was an issue with low water pressure.[67] Mr. Smith also confirmed that in each case the water pressure met or exceeded the 30 psi standard that is incorporated in the Water District's tariff.[68] The record shows that the Water District has been able to maintain adequate pressure to its customers. Moreover, the Water District failed to allege, much less prove, that increased storage capacity was needed to regulate or improve pressure flows. While the Water District bases its CPCN on the need to comply with 807 KAR 5:066, Section 4(4), it has failed to demonstrate there is a substantial inadequacy of existing service.

C. The Proposed Tank Is Wastefully Duplicative.

Even if the Water District could establish that it needed an additional one million gallons of water storage, it bears the burden of proving that the proposed tank will not create wasteful duplication.[69] "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."[70] The tank proposed in this proceeding implicates all three of the factors that define "wasteful duplication."

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[65] See Application at Exhibit A, unnumbered second page.
[66] See the Water District's Response to Item No. 14 of the Commission's First Data Request. One of the ten complaints was from the southeast service area and was erroneously provided.
[67] 3/14/13 Hearing Transcript at 9:59:00-9:59:26.
[68] 3/14/13 Hearing Transcript at 10:00:10-10:00-28.
[69] Kentucky Utilities Co. v. Public Service Commission, 252 S.W.2d 885, 890 (Ky. 1952).
[70] Id.

First, building a one million gallon water tank will cause an excess of capacity over need. The hydraulic analyses performed by the Water District demonstrate that if the proposed tank is constructed, on average, the Water District will have ***at least 513,230 gallons of excess storage capacity over need.*** This capacity is truly excess - it cannot be used without risking serious water quality degradation concerns because of the inability of the water to turn over in the tank in a timely period.

Moreover, the Water District failed to prove that it has a future need for the excess storage because it relies solely on demand projections from 2006 that have, thus far, overestimated the Water District's actual growth by 35%. It is important to consider that the demand projections were calculated in 2006 as part of the Water's District application for a System Development Charge in connection with the tank proposed in this proceeding. Even assuming that in 2006 the demand projections reasonably led the Water District to believe it needed a one million gallon tank (which the Intervenors dispute), the fact that its projections have fallen 35% below the expected level of growth should have caused the Water District to reevaluate whether one million gallons of storage was still necessary. The Water District failed to do so.

The second factor defining "wasteful duplication" is an excessive investment in relation to productivity or efficiency. The estimated cost to construct the tank is $2,192,000.00.[71] The Water District plans to finance the construction using grant proceeds and a $1,192,000 bond issue.[72] An investment of over $2 million is certainly significant, as the Water District's capital assets at year-end 2011 were only $12,361,815.[73] The Water District failed to demonstrate that the significant investment produces equally significant gains in productivity or efficiency. If

[71] See Application at ¶6.
[72] See Application at Exhibit B.
[73] See Application at Exhibit G.

constructed, both the proposed tank and the existing 50,000 gallon tank will be underutilized because of excess capacity. Moreover, the proposed tank will also increase the Water District's operation and maintenance expenses.[74]

The Water District stated that it will not have to increase rates as a result of the $1,192,000 bond issue because it will make the final payment on a $1,924,874 Kentucky Infrastructure Authority Loan in June 2013 and proposes to maintain in rates the amount of debt service annually required of the retiring debt to service the new bond issue.[75] Chairman Strong conceded during the hearing that if the proposed tank was not constructed, the Water District could potentially reduce rates for its customers once the June 2013 debt is retired.[76] Simply because the Water District does not plan to increase rates as a result of the construction does not mean the investment is not significant. Undertaking large construction activities that are not needed in order to maintain a consistent amount of revenues is unreasonable.

The third factor defining "wasteful duplication" is an unnecessary multiplicity of physical properties. The Intervenors cannot envision a clearer case of the unnecessary multiplicity of physical properties than constructing a water tank across the road from an existing water tank that will sit completely empty roughly 75% of the time as a result of the proposed construction. 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."[77] Here, the Water District proposes to clutter the land with large elevated water storage tanks that are devastatingly inconvenient to the

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[74] See Application at Exhibit F.
[75] Water District's Response to Item No. 33 of the Intervenors' First Request for Information.
[76] 3/13/13 Hearing Transcript at 10:36:35-10:36:56.
[77] Kentucky Utilities Co. v. Public Service Commission, 252 S.W.2d 885, 892 (Ky. 1952).

residents of Forest Hills and will cause the residents, on average, to suffer a 20% diminution in the value of their homes because of the proximity of the tank.[78] Further explanation of the effect on the Intervenors if the proposed tank is constructed is discussed later in this Brief. The Water District should consider removing the existing 50,000 gallon tank and placing 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.

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.

D. The Water District Failed to Consider Other Water Storage Alternatives.

In addition to the three factors the Kentucky Court of Appeals articulated regarding wasteful duplication, the Commission has held that in order for a utility to demonstrate that a proposed facility does not result in wasteful duplication, the applicant must demonstrate that a thorough review of all reasonable alternatives has been performed.[79] The Water District cannot satisfy this burden because the evidence demonstrates that (1) the Water District failed to consider storage alternatives other than a one million gallon elevated storage tank and (2) the Water District failed to conduct a reasonable site selection process.

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[78] 3/14/13 Hearing Transcript at 11:51:11-11:52:11.

[79] Case No. 2005-00142, Joint Application of Louisville Gas and Electric Company and Kentucky Utilities Company for a Certificate of Public Convenience and Necessity for the Construction of Transmission Facilities in Jefferson, Bullitt, Meade, and Hardin Counties, Kentucky (Ky. PSC Sept. 8, 2005).

At no point in this proceeding did the Water District demonstrate why it needs a one million gallon storage tank. While the Water District argues it needs additional storage capacity, there is no principled basis for deciding one million gallons is appropriate. During the hearing John Horne admitted that the one million gallon capacity was based on his opinion and that three other engineers could come up with "six different answers" as to the appropriate size of the tank.[80] Mr. Horne stated there is no formula for sizing tanks and that the Water District utilized "seat of their pants designing and engineering" with respect to the project because of the small size of the Water District.[81] For a project that has been in development for over a decade and will cost over $2 million, this is unacceptable.

The decision to pursue a one million gallon tank is even more puzzling because documents produced by the Water District demonstrate that, at least early on, the Water District believed a 500,000 gallon tank was appropriate.[82] In response to a data request inquiring why the Water District later doubled the size of the proposed tank, the Water District stated that when a 500,000 gallon tank was being considered, the CIP had not been conducted.[83] This is an inadequate response because the CIP does not provide support for a one million gallon tank and Mr. Horne testified that he based the size of the tank on his opinion and judgment. Also absent from the record is any discussion from the Board on the need for a 500,000 or 1,000,000 gallon tank. While the Board discussed funding sources and approved distribution projects related to the proposed tank, noticeably missing was any sincere and informed discussion on why this tank is needed.

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[80] 3/13/13 Hearing Transcript at 14:30:43-14:31:11.
[81] 3/13/13 Hearing Transcript at 16:15:24-16:15:28.
[82] See, e.g., John Horne's September 18, 2002 letter to Keith Flora produced in Response to Item No. 1 of the Intervenors' First Requests for Information, "Their [Water District's] plan is to construct an additional 500,000 gallon elevated storage tank."
[83] See Water District's Response to the Intervenors' Supplemental Data Request, Item No. 14.

It is clear that neither Mr. Horne nor the Water District conducted any reasonable investigation as to the appropriate capacity of the tank. It is equally clear that no alternatives to an elevated storage tank were considered. For example, the CIP stated that prior to the 1990s, the Water District "had relied on the available storage of its supplier, Kentucky American Water Company, and had found it adequate."[84] The Water District purchases water to serve its northwest service area from KAWC at two metering points pursuant to a water purchase agreement executed in 1986.[85] Despite the fact that KAWC has six million gallons of storage capacity at its Clays Mills complex, which is close in proximity to one of its metering points with the Water District,[86] the Water District failed to consider whether it could utilize KAWC's available storage. The Water District claims that its water purchase agreement with KAWC does not permit the Water District to rely on KAWC for storage, but the Clays Mill complex was constructed after the water purchase agreement was executed. Certainly, the Water District could, at a minimum, ask KAWC whether it could utilize KAWC's storage and negotiate an amendment to a 27 year old contract. The Water District confirmed it has not even inquired into whether KAWC has available storage.[87]

Another alternative the Water District has not considered is seeking a deviation from 807 KAR 5:066, Section 4(4), which states: "The minimum storage capacity for systems shall be equal to the average daily consumption." The Water District has based its entire application on complying with this regulation, but has not investigated whether seeking a deviation would be more prudent than constructing an elevated storage tank that will result in excess capacity. Other water utilities, including KAWC, have obtained deviations from 807 KAR 5:066, Section

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[84] CIP, p. 6.
[85] 3/13/13 Hearing Transcript at 16:06:30-16:06:59; see the Water District's Motion for Full Disclosure of Intervenors' Relationship to Kentucky American Water Company at Exhibit 1.
[86] 3/13/13 Hearing Transcript at 16:04:35-16:05:12.
[87] 3/13/13 Hearing Transcript at 16:01:30-16:01-36.

4(4) by demonstrating that they have storage to maintain sufficient pressures.[88] Mr. Horne admitted knowing the Water District could seek a deviation from the regulation.[89]

The Water District has not received a notice of violation from the Commission with respect to 807 KAR 5:066, Section 4(4); has no issues with low water pressure; and has demonstrated an ability maintain pressures through judicious pump management. Moreover, the Water District is currently negotiating a contract with the City of Nicholasville to be a second source of water supply for the northwest service area.[90] The redundancy in source of supply would further support the Water District's request for a deviation. In addition, the Water District has a portable generator that can provide power to the Water District's equipment.[91] Having this backup power source would also strengthen an application for a deviation. In short, because there are no existing deficiencies of service and the Water District is currently negotiating a second source of supply, the Water District should investigate seeking a deviation from 807 KAR 5:066, Section 4(4) before undertaking a $2 million project. The Intervenors do not intend to suggest that utilizing KAWC for storage or seeking a deviation are the only two alternatives to constructing an elevated storage tank. Instead, these alternatives are intended as examples to demonstrate that the Water District has failed to consider other water storage alternatives.

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

In addition to failing to consider other storage alternatives, the Water District failed to perform a reasonable site selection process when it purchased the Switzer site, as well as prior to

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[88] See, e.g., Case No. 93-342, In the Matter of: Application of Kentucky-American Water Company for a Determination by the Public Service Commission of the Adequacy of Its Water Storage Capacity Analysis and for a Deviation from 807 KAR 5:066, Section 4(4) Until December 31, 2005 Pursuant to 807 KAR 5:066, Section 18 (Ky. PSC December 20, 1993).
[89] 3/13/13 Hearing Transcript at 16:40:39-16:40:45.
[90] 3/13/13 Hearing Transcript at 16:27:25-16:27:41; 3/13/13 Hearing Transcript at 9:50:25-9:50:35.
[91] 3/13/13 Hearing Transcript at 14:35:10-14:35:23.

requesting a CPCN, even though the built environment surrounding the site had changed significantly since the land was purchased. In dealing with the Intervenors, as well as throughout this proceeding, the Water District has insinuated that because it purchased the Switzer site, it can do whatever it wants with the property – including building a one million gallon water tank on it. This conflicts with the Commission's rulings.

The Commission has consistently denied applications for a CPCN when the utility has not demonstrated that it sufficiently considered alternative locations for the proposed construction.[92] For example, 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."[93]

- "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, 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."[94]

- "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

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[92] 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).

[93] 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).

[94] 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)

> 'weekend review' of the Concerned Citizens' alternative by one of its engineers does not suffice to meet this requirement."[95]

In these decisions, the Commission made clear that unless the utility demonstrates that it comprehensively considered alternative locations, the Commission lacks sufficient information to determine whether the proposed construction would cause wasteful duplication.[96]

The Water District concedes that it did not compare the Switzer site to any other potential sites. When asked to identify and 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..."[97] When asked to describe the Water District's logic in selecting a site for the proposed tank, the Water District stated "Topo maps were examined to find locations with sufficient elevation to effectively construct an elevated storage tank, property owners were identified for these locations and the owners were contacted to ascertain interest. Sue Switzer was the only owner willing to discuss a sale of a parcel..."[98] 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."[99] 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 for purchase by [the Water District]; and cost of site."[100] When the

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[95] 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).
[96] Id.
[97] Water District's Response to Item No. 3 of the Intervenors' First Requests for Information.
[98] Water District's Response to Item No. 4 of the Intervenors' First Requests for Information.
[99] Water District's Response to Item No. 13 of the Intervenors' Supplemental Requests for Information.
[100] Water District's Response to Item No. 5 of the Intervenors' First Requests for Information.

Intervenors asked for clarification on what "sufficiency" means, the Water District cited Webster's Seventh Collegiate Dictionary.[101]

These responses demonstrate that the Water District's site selection process was a blindly conducted approach in which the Water District picked the first site that it found in which the owner was willing to sell. The Water District's entire site selection process contained two variables: sufficient elevation (although the Water District's claimed minimum elevation changed throughout the proceeding) and a willing seller. The "willing seller" variable is neither significant nor dispositive to the site selection inquiry because the Water District is aware that it has the power of eminent domain and has utilized that power for sewer improvements.[102]

Michael Ritchie, President of Photo Science Geospatial Solutions, testified at the hearing on behalf of the Intervenors that based upon his professional experience and judgment, the Water District's site selection methodology was not reasonable because it failed to take into consideration other important variables, including the man-made built environment.[103] On January 4, 2013, the Intervenors submitted the Jessamine South Elkhorn Water District Water Tank Siting Study ("Study") that Photo Science prepared under Mr. Ritchie's supervision.[104] 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 the past seven years.[105]

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[101] Water District's Response to Item No. 5 of the Intervenors' Supplemental Requests for Information.
[102] 3/13/13 Hearing Transcript at 16:19:40-16:20:01; 3/13/13 Hearing Transcript at 11:12:10-11:12:27.
[103] 3/14/13 Hearing Transcript at 14:18:10-14:19:20.
[104] See Intervenors' January 4, 2013 Notice of Filing and attachment thereto.
[105] Jessamine South Elkhorn Water District Water Tank Siting Study ("Study"), p. 3.

Mr. Ritchie explained that the Study considered the three separate criteria that are integral to beginning a reasonable site selection process: engineering criteria; natural environment; and the built environment.[106] Mr. Ritchie confirmed that the Study was not intended to be a final determination of a specific site, but instead was the starting point of the site selection process.[107] Mr. Ritchie explained that the Study utilized not only engineering criteria, but consideration of the natural environment and the built environment because it is crucial that the utility consider all three prongs at the outset of a site selection process in order to appropriately balance the relevant factors.[108] This is similar to the Commission's review of an application for a CPCN, in which it "must balance all relevant factors."[109]

The Study demonstrated that even within a 1.25 mile radius of the Switzer site, there were several sites that satisfy the Water District's engineering criteria that did not have natural environment concerns and had a significantly decreased effect on the built environment because fewer homes would be in the viewshed of the proposed tank.[110] On February 25, 2013, shortly before the hearing, the Water District filed an Evaluation of Jessamine-South Elkhorn Water District Water Tank Siting Study by Photo Science ("Evaluation") prepared by John Horne.[111] The Evaluation addressed Mr. Horne's complaints with the Study. For example, the Evaluation took issue with the Study's engineering criteria, which consisted of an acre of land with a minimum elevation of 950 feet.[112] The Evaluation stated that the proposed tank had to be at an

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[106] Id. at p. 3-6.
[107] 3/14/13 Hearing Transcript at 14:47:40-14:48:15.
[108] 3/14/13 Hearing Transcript at 14:05:12-14:07:05.
[109] 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).
[110] See Study generally.
[111] See the Water District's February 25, 2013 Filing.
[112] See Study at p.3; Evaluation at p. 13.

elevation of at least 1,000 feet.[113] At the hearing, Mr. Horne again increased the minimum elevation to 1,020 feet.[114] The Study utilized 950 feet as the minimum elevation because the Water District stated that 950 feet was the minimum elevation in both its answer in Case No. 2011-00138 and in its response to the first set of data requests.[115] Certainly Photo Science cannot be criticized for relying on the Water District's own statements, especially when the Water District did not revise its answer until weeks after the Study had been filed with the Commission.

The Evaluation, with its myriad claims of minor inaccuracies in the Study, continued the "just say no" refrain that has persisted throughout the Intervenors' dealings with the Water District. For each of the sites presented by the Intervenors themselves, as well as those in Mr. Ritchie's Study, the Water District has argued it is an unacceptable location. Whether it is alleging title concerns, changing the minimum elevation of the land, or stating that the owner was not willing to sell, the Water District – despite having conducted ***no*** site selection process – refuses to concede that any other site may be more acceptable for the proposed tank.

Mr. Ritchie's testimony during the hearing, as well as the Study, demonstrates that a reasonable site selection process that thoroughly examines all alternative locations, as required by the Commission's orders, considers not only engineering criteria, but the effect on the built environment, as well. 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

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[113] Evaluation at p. 13.
[114] 3/13/13 Hearing Transcript at 12:12:08-12:12:35.
[115] See Water District's Answer in Case No. 2011-00038 at p. 2(a); Water District's Response to Item No. 45 of the Intervenors' First Requests for Information.

tank. 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 the Proposed Tank.

i. The Water Tank, If Constructed, Will Cause Damages to the Intervenors Exceeding $2.5 Million.

The Switzer site, which is less than 200 feet away from the nearest residence, is not an acceptable location for the proposed tank because it will irreparably diminish the value of the homes in Forest Hills.[116] The dimensions show that the structure is an impressive size – roughly 150 feet tall, with a tank that is 70 feet in diameter sitting atop eight legs.[117] The Water District's position with respect to the significance of the built environment, namely the proximity of Forest Hills to the proposed tank, was best expressed by Mr. Horne at the hearing: "...you keep forgetting the fact the District was there before the neighbors [Forest Hills] showed up..."[118] In other words, it is "not the District's responsibility to kowtow to two" customers.[119]

The Water District dismisses the Intervenors' concerns about the effect on the property values of their homes as a result of the proximity of the proposed tank by arguing that because the Water District purchased the Switzer site before Forest Hills was constructed, the Water District is under no obligation to consider the impact to the Intervenors. The Water District makes much of the fact that property records showed that the Water District owned the Switzer site before Forest Hills was developed. While true, no plat, easement record, advertisement, or sign provided any indication that the Water District planned to construct a one million gallon water tank on the site.[120] Unless the residents of Forest Hills possessed some measure of

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[116] 3/14/13 Hearing Transcript at 11:51:11-11:52:11.
[117] Intervenors' Exhibit IX-7.
[118] 3/13/13 Hearing Transcript at 16:44:00-16:14:13.
[119] 3/13/13 Hearing Transcript at 16:44:13-16:14:29.
[120] 3/14/13 Hearing Transcript at 11:06:45-11:07:19.

clairvoyance, they would not have learned that the Water District planned to construct a tank on the site even by examining every existing plat or easement of record.

The Water District's emphasis on the built environment when the Switzer site was purchased is not only incorrect, but, if accepted, would diminish the Commission's ability to prevent "wasteful duplication." The built environment in 2003 when the site was purchased is not relevant to this proceeding because the Water District chose to wait ***nine years*** until October 16, 2012 to request a CPCN. In evaluating the CPCN, the Commission must balance all relevant factors as they exist today – not as they existed nine years ago. Consideration of the Water District's CPCN must balance all relevant factors, including aesthetic concerns, as they presently exist.[121]

Clark Toleman, a residential and commercial appraiser, with approximately 40 years of experience assessing the value of properties in Central Kentucky, including Jessamine County, 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%, which is a dramatic reduction.[122] Toleman based his opinion on his visits to Forest Hills; the assessed values of the properties; and his judgment that the proximity of the water tank to the residences is a stigma.[123] "Stigma" refers to an undesirable structure or feature that is incompatible with the area, such as a large elevated water tank in a pastoral setting such as Forest Hills.[124] In reaching his conclusions, Mr. Toleman examined KAWC's one million gallon elevated storage tank on Cox Street,[125] which is a similar design to the proposed tank. Mr. Toleman testified that because of the size of the tank

[121] See the Commission's March 8, 2013 order in this proceeding noting that aesthetic concerns were relevant to this proceeding.
[122] 3/14/13 Hearing Transcript at 11:35:52-11:35:59; 3/14/13 Hearing Transcript at 11:51:11-11:52:11; Intervenors' Response to Item No. 3(a) of the Water District's Supplemental Requests for Information.
[123] 3/14/13 Hearing Transcript at 11:40:00-11:40:30; 3/14/13 Hearing Transcript at 11:44:00-11:45:18.
[124] 3/14/13 Hearing Transcript at 11:43:08-11:45:18.
[125] 3/14/13 Hearing Transcript at 11:45:22-11:45:39.

and its proximity to the residences, the proposed tank would dominate the viewshed in the subdivision.[126]

Mr. Toleman further explained that the effect of a stigma is more pronounced in upscale neighborhoods, such as Forest Hills, because prospective purchasers of these upscale properties have more choices as to where they can purchase properties and will simply choose not to purchase property in a subdivision with a million gallon above-ground water tank adjacent to it.[127] Based upon the assessed values of the Forest Hills residences and Mr. Toleman's estimation that the homes, on average, will lose 20% of their value, the resulting damage is over $2.5 million, which exceeds the estimated $2,192,000.00 million cost of the proposed tank.[128]

Mr. Horne's Evaluation stated that the Intervenors' conclusions regarding "diminished desirability and property values due to an elevated storage tank being visible to a lot owner is incorrect."[129] Similarly, William Berkley, an appraiser who testified for the Water District, stated in the Market Analysis he prepared that close proximity to an elevated storage tank does not result in a diminution in market value."[130] Both Mr. Horne and Mr. Berkley base their opinions on comparing Forest Hills with the Harrods Ridge subdivision, a neighborhood in Jessamine County that is partially in the viewshed of the Water District's existing 500,000 gallon tank. Because the homes in Harrods Ridge have assessed values similar to those in Forest Hills, both Mr. Horne and Mr. Berkley contend this is proof that a visible elevated storage tank does not affect property values.[131]

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[126] 3/14/13 Hearing Transcript at 11:48:28-11:48:44.
[127] Intervenors' Response to Item No. 3(a) of the Water District's Supplemental Requests for Information; 3/14/13 Hearing Transcript at 11:39:10-11:39:36.
[128] 3/14/13 Hearing Transcript at 11:51:11-11:52:11; see Application at ¶6.
[129] Evaluation, p. 20.
[130] See Market Analysis, p. 29.
[131] Evaluation, p. 21-35; Market Analysis, p. 8-12.

There are two critical differences between Forest Hills and Harrods Ridge that render Mr. Horne's and Mr. Berkley's comparison and conclusion incorrect. First, when Harrods Ridge was constructed, the 500,000 gallon water tank had already been built.[132] This means that when the Harrods Ridge residences were constructed, the effect of the visible water tank was reflected in the value of the homes. Mr. Horne admitted this during the hearing.[133] Second, the residence in Harrods Ridge that is closest to the existing 500,000 gallon tank is 1,200 feet away from the tank, while the residence in Forest Hills that is closest to the proposed one million gallon tank is less than 200 feet away – meaning it is more than ***six times closer***.[134] Because of these two crucial differences, the values of the homes in Harrods Ridge do not prove that the homes in Forest Hills will not lose value if the proposed tank is constructed.

Mr. Berkley also based his opinion on the presence of a 500,000 gallon water tank in the Lansdowne area of Lexington, Kentucky using the sale prices from over fifteen years ago of two homes in the viewshed of a KAWC tank on Bellefonte Drive.[135] This example is also without merit, as the Bellefonte homes are not comparable to Forest Hills residences with respect to market value or square footage.[136] Moreover, Mr. Berkley conceded that the Lansdowne area was more developed than the area surrounding Forest Hills.[137] These differences are consistent with Mr. Toleman's testimony that the diminution in market value because of a stigma, such as the water tank, is greater in upscale neighborhoods, such as Forest Hills, than other neighborhoods, such as Lansdowne.[138]

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[132] Evaluation, p. 20.
[133] 3/13/13 Hearing Transcript at15:22:00-15:22:28.
[134] 3/14/13 Hearing Transcript at 12:05:23-12:05:37.
[135] See Market Analysis, p. 27-28.
[136] 3/14/13 Hearing Transcript at 16:16:11-16:18:07.
[137] 3/14/13 Hearing Transcript at 16:15:47-16:16:09.
[138] 3/14/13 Hearing Transcript at 11:39:10-11:39:36.

During the hearing, Mr. Berkley's failure to acknowledge the negative impact of a 150 foot tall, one million gallon water tank less than 200 feet from a residence was not credible. Mr. Berkley is familiar with the Uniform Residential Appraisal Report and admits that "view" is one of the features on the Report that the appraiser must compare to similar properties in order to value a residence.[139] The appraiser must describe the view of the home being assessed as adverse, neutral, or beneficial. When asked whether he would describe the view of the Forest Hills home that is less than 200 feet away from the water tank as adverse if the tank is constructed, Mr. Berkley stated he could not do so without a market study to support it.[140] When asked whether he had a market study to support every adjustment he ever made during residential appraisals, Mr. Berkley said he tried to have a study for every adjustment.[141] This testimony, and Mr. Berkley's refusal to concede that the proposed tank would adversely impact the view – ***at a minimum*** – of the home closest to the proposed tank strains credulity, especially considering that during the hearing Mr. Berkley was handed photographs demonstrating that the proposed tank would eliminate the pastoral view by completely dominating the viewshed.

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 focused on the additional expenses it will be required to incur if the proposed water tank is constructed in 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.[142] The Water District, through a series of unilateral decisions, ostensibly deemed it prudent to incur

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[139] 3/14/13 Hearing Transcript at 16:11:20-16:11-45.
[140] 3/14/13 Hearing Transcript at 16:12:01-16:12:54.
[141] 3/14/13 Hearing Transcript at 16:12:58-16:13:15.
[142] For example, in the Water District's Answer and exhibits thereto in Case No. 2011-00138, "relocation" was mentioned twenty times.

a number of significant expenses related to a water tank for which it had not even applied for a CPCN. These include:

- Purchase of the Switzer site: $40,000
- Upsizing lines near the proposed tank: $70,647.80
- Horne Engineering design costs: $65,000
- Horne Engineering costs associated with acquiring the proposed site: $9,170
- Geotechnical survey: $4,625
- Legal fees associated with acquisition: $2,548.30
- Archeological survey: $2,600
- Bid costs: $9,011.58[143]

The Water District claims these expenses will be an "out of pocket loss" if the Water District is required to repeat these steps at another site.[144] 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. 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.

Even more concerning is that the Water District relies on the improvements it made to the Switzer site as proof that it is a suitable location in an attempt to eliminate any objective site comparison. For example, Mr. Horne's Evaluation criticizes the sites in Photo Science's Study, arguing:

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[143] 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.

[144] Water District's Response to Item No. 23 of the Intervenors' First Request for Information.

> As indicated in the current proposed Switzer site, the delivery piping to the tank must come from a distribution system that is capable of delivering the amount of water necessary to serve not only the customer demand, but also be able to provide adequate flow in order to maintain the storage capabilities of the tank. **A number of alternates that the PhotoScience Siting Study indicated are adjacent to lines 4 inches and 6 inches in size, which are wholly inadequate to furnish sufficient flow to supply a storage tank.**[145]

The Water District incurred over $70,000 to upsize the lines in the area surrounding the Switzer site, but criticizes the sites in the Study for allegedly being near waterlines that would need to be upsized.

Under the Water District's biased scoring system, it would be impossible for any site to be more cost effective than the Switzer site because the Evaluation omits the costs associated with the Switzer site as if they do not exist:

[145] Evaluation, p. 15 (emphasis added).

ALTERNATE SITE COSTING

	Site A	Site B (Brown)	Site C (Switzer)	Site D	Site E	Site F	Site G	Site H
Piping	$165,000	$4,500	0	$90,000	$78,000	$7,500	$3,000	$6,000
($30/LF)	5,500 (3)	150 (4)	0	3,000 (5)	2,600 (7)	250 (9)	100 (12)	200 (15)
Pipe Upgrade	0	0	0	$126,000	$126,000	$126,00 0	$135,00 0	$67,500
(12"- $45/LF)	0	0	0	2,800 (6)	2,800 (8)	2,800 (10)	3,000 (13)	1,500 (16)
Access Road	$102,450	0	0	$115,620	$128,220	$6,750	0	0
($30/LF)	3,415	0	0	3,854	4,274	225	0 (14)	0 (17)
Leg Height	$60,000	$24,000	0	-$168,000	-$120,000	$276,00 0	$444,00 0	$432,00 0
($12,000/VF)	5	2	0	-14	-10	23 (11)	37	36
Others	$14,350	$14,350	0	$14,350	$14,350	$14,350	$14,350	$14,350
Land	$40,000	$40,000	0	$40,000	$40,000	$40,000	$40,000	$40,000
TOTAL	**$381,800**	**$82,850**	**0**	**$217,970**	**$266,570**	**$470,60 0**	**$636,35 0**	**$559,85 0**
Residences in Viewshed	0	30	16	5	6	15	6	9
Residences .5 mi Radius	1	46	26	6	8	25	6	16
Percentage in Viewshed	0	65	62	83	75	60	100	56

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The Water District's Alternate Site Costing ignores that significant piping; pipe upgrading; surveying; archeological; geotechnical; and land expenses have already been incurred for the Switzer site. An objective cost comparison would include all of the expenses the Water District has already incurred. With respect to site comparison and suitability, the Water District is asking the Commission to (1) focus on the built environment that existed in 2003 - thereby ignoring the 2013 built environment and (2) the expenses ***remaining*** in 2013 - thereby ignoring the expenses the Water District began incurring in 2003. This is patently unreasonable.

In conclusion, the Switzer site, which is immediately adjacent to Forest Hills, is not a suitable site for the proposed water tank because of the dramatic effect the tank will have on the

[146] Evaluation, p. 33

built environment. The Water District claims that the Intervenors' concerns are mooted by the fact that the Water District owned the site prior to the development of Forest Hills. This is incorrect, as the Commission must determine whether the site is reasonable based upon the presently existing built environment. The cost comparisons the Water District submitted and its complaints of "out of pocket" losses are results-oriented and do not demonstrate the Switzer site is reasonable. The Water District should not be permitted to cause over $2.5 million in decreased property values to construct a tank it has not proven that it needs.

G. The Water District Treated the Intervenors Unreasonably.

Throughout their multi-year efforts to prove to the Water District that the Switzer site is an unacceptable location for the proposed tank, the Water District treated the Intervenors, who are their customers, unreasonably, 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. The Water District's attitude remains unequivocal: if the Water District builds the one million gallon tank somewhere other than the Switzer site, the Intervenors will have to pay for it. This, of course, presupposes that the Commission would otherwise grant the CPCN the Water District has requested.

While the Intervenors were attempting to negotiate with the Water District, 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. The Intervenors first investigated a site owned by Lloyd McMillen, which, based upon the Water District's initial estimates, would have required the Intervenors to pay $125,000 in "relocation costs."[147] Later the Water District more than doubled

[147] 3/14/13 Hearing Transcript at 10:44:23-10:44:46.

this estimate and told the Intervenors that the "relocation costs" for the McMillen property would exceed $279,000.[148]

Chairman Strong then suggested that the Intervenors investigate purchasing an acre of land from Ronald Brown near the existing 50,000 gallon tank.[149] The Intervenors contacted Mr. Brown, negotiated a purchase price of $65,000 for an acre of land, and tendered letters to the Water District from Mr. Brown and the Intervenors evincing the intent of the parties to consummate the transaction.[150] Upon receiving these letters in January 2011, the Water District suddenly reversed course based on a memorandum Mr. Horne prepared stating that "obtaining clear title would be impractical, but possible" at the Brown site.[151] Following this memorandum, the Water District's counsel mailed letters to the Intervenors' counsel stating the Water District had decided to move forward with the Switzer site because of the title concerns and the Water District's "short timeline."[152] The timeliness concern was puzzling, as the Water District had owned the Switzer site for eight years at this point.

Even after being told the Brown site was unacceptable, the Intervenors were undeterred. Despite the exorbitant costs for the McMillen site, the Intervenors contacted the Water District to ask whether that site was still an option.[153] During a phone call with Logan Davis, Chairman Strong said the McMillen site was still an option but cautioned Mr. Davis to "get to work."[154] Following this phone call, the Water District's counsel sent a contract to Mr. Davis that set forth a series of burdensome requirements that the Intervenors had to accomplish in short order for the Switzer site to be reconsidered, which included posting a $250,000 irrevocable letter of credit

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[148] Water District's Response to Item No. 7 of the Intervenors' First Request for Information.
[149] 3/14/13 Hearing Cite at 11:14:10-11:14:22.
[150] Intervenors' Exhibits 1 and 2.
[151] See Water District's Answer in Case No. 2011-00038 at Exhibit H.
[152] Id. at Exhibit I.
[153] 3/14/13 Hearing Transcript at 11:17:16-11:17:44.
[154] 3/14/13 Hearing Transcript at 11:17:44-11:18:21.

within twelve days; submitting a binding purchase agreement for the McMillen site within thirty days; submitting a binding contract for all necessary easements within thirty days; and receipt by the Water District of a satisfactory geophysical report within sixty days.[155] The implausibility of this timeline is demonstrated by the fact that it took the Water District over a year to purchase the Switzer site and another year to have a geotechnical report completed.[156]

The proposed contract also stated that if any one of the foregoing conditions was not satisfied "there will be no further discussions or negotiations" with the Intervenors and the Water District "will therefore return its attention towards obtaining the necessary additional financing and constructing the tank on the Switzer site adjoining Forest Hills."[157] Further, the Intervenors "shall be obligated to reimburse the District for all expenses, including but not limited to engineering, legal and administrative costs."[158] This is in addition to the requirement that the Intervenors "execute a release of all claims that it believes it may now or in the future have against the District based on the failed exchange of these or prior sites."[159] Surprised and dismayed, the Intervenors filed a complaint at the Commission against the Water District.[160]

The timeline of events revealed in discovery shows that the Water District engaged in an unreasonable pattern of conduct. During the year in which the Intervenors were performing site selection efforts for the Water District, the Intervenors attended most of the Board's monthly meetings.[161] At each meeting, Forest Hills representatives waited in the hall until they were invited into the meeting, addressed the Board regarding the status of their site selection efforts, and were either ushered out so that the next guests could address the Board, or were otherwise

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[155] See Exhibit JSEWD-Strong 4.
[156] See Water District's Response to Item No. 11 of the Intervenors' First Request for Information; see the Water District's Response to Item No. 3 of the Intervenors' Supplemental Requests for Information.
[157] Exhibit JSEWD-Strong 4.
[158] Id.
[159] Id.
[160] See Case No. 2011-00138.
[161] See generally Exhibit IX-4.

made to feel as if they should leave.[162] The Board minutes demonstrate that after the Forest Hills representatives would apprise the Board of their efforts and leave, the Board would then vote to proceed with various aspects of the Switzer site at the same meeting.[163]

Cumulatively, the Water District's actions make clear that it never intended to proceed with any site other than the Switzer site, all the while knowing that the Intervenors – who were acting in good faith – were expending significant effort and expense in investigating suitable locations for the proposed tank. 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. 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.[164] 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.[165]

Each time the Intervenors believed they were making progress, the Water District changed the rules, culminating in the Water District requesting the Intervenors to sign a contract that not only released their claims against the Water District, but obligated the Intervenors to reimburse the Water District for its expenses in considering an alternative location. The Water District's customer service practices with respect to the Intervenors have been unreasonable. In

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[162] 3/14/13 Hearing Transcript at 10:40:45-10:42:26.
[163] See, e.g., Exhibit IX-4 at November 3, 2010 minutes, December 1, 2010 minutes.
[164] Case No. 93-406, In the Matter of: Armster Bruner, Jr. v. Lexington-South Elkhorn Water District (Ky. PSC Aug. 19, 1994)
[165] Id.

addition to denying the CPCN, the Intervenors respectfully request the 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. Tellingly, the Water District focuses upon what the Intervenors have or have not done with respect to site selection and investigating other alternatives for the proposed tank, while noticeably absent from the Water District's case is proof that it needs a one million gallon elevated storage tank or that its site selection process was reasonable. For a project that has been under consideration and development for a decade, the dearth of proof regarding need, demand forecasting, and comprehensive site selection is remarkable. 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 3rd day of April 2013.

Respectfully submitted,

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

By: Monica H. Braun
Counsel for Intervenors

CERTIFICATE OF SERVICE

This is to certify that the foregoing pleading has been served by e-mail and U.S. mail, postage prepaid, to the following persons on this the 3rd day of April 2013:

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

W. Randall Jones, Esq.
Rubin & Hays
Kentucky Home Trust Building
450 South Third Street
Louisville, Kentucky 40202
wrjones@rubinhays.com

Anthony G. Martin
P.O. Box 1812
Lexington, KY 40588
agmlaw@aol.com

Monica H. Braun
Counsel for Intervenors

114681.140074/4109904.10