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April 2, 2013

**VIA UPS OVERNIGHT**

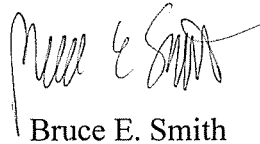
Mr. Jeff R. Derouen  
Executive Director  
Kentucky Public Service Commission  
211 Sower Boulevard  
Frankfort, Kentucky 40602

Re: **Case No. 2012-00470**

Dear Mr. Derouen:

Enclosed for filing are an original and ten (10) copies of the Post-Hearing Brief for Jessamine –South Elkhorn Water District.

Sincerely,



Bruce E. Smith

Enclosures

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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 )  
IMPROVEMENTS PROJECT PURSUANT TO KRS )  
278.020 AND 278.300 )**

**CASE NO 2012-00470**

**POST-HEARING BRIEF**

**FOR JESSAMINE-SOUTH ELKHORN WATER DISTRICT**

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## I. INTRODUCTION

This case involves an application by the Jessamine-South Elkhorn Water District (“JSEWD” or “the District”) under KRS 278.020(1) for a certificate of public convenience and necessity (“CPCN”) authorizing the construction of a 1.0 MG elevated storage tank that is needed to continue to provide adequate service to customers in JSEWD’s northwest service area. The Application further requests approval of the financing for this project pursuant to KRS 278.300. JSEWD has established that public convenience and necessity require construction of the proposed water tank to provide adequate service and reliability for the current and future needs of its customers in its northwest service area. JSEWD has further established that the proposed water tank is both reasonable and cost-effective, and will not result in wasteful duplication. The record in this proceeding in fact establishes that the proposed water tank is the most reasonable and least-cost solution both for bringing JSEWD in to full compliance with the Commission’s regulations and for assuring adequate service to JSEWD’s northwest service area customers. The proposed water tank will assure adequate storage capacity so as to meet the needs of this growing part of JSEWD’s service area.

As set forth herein, and as further supported by the record and the reasons set forth below, the Commission should grant the requested CPCN for JSEWD’s proposed storage tank. Further, the Commission should approve the financing requested by JSEWD pursuant to KRS 278.300, which in conjunction with the \$1,000,000 appropriation approved by the Kentucky Legislature for this project, will result in an extremely cost effective addition of needed storage for the benefit of all of JSEWD’s customers in the northwest service area, both present and future.

## II. PROCEDURAL HISTORY

JSEWD filed its Application with supporting exhibits on October 16, 2012. By Order dated October 26, 2012, the Commission granted JSEWD's request for deviation from 807 KAR 5:001, Section 11(2)(a), and accepted the application for filing as of that date. On or about October 26, 2012, the Forest Hills Residents' Association, Inc. ("Residents' Association") and Mr. William Bates (collectively "Intervenors") filed a Motion for Full Intervention. This Motion was granted by Commission Order dated November 5, 2012.

By Order dated November 9, 2012, the Commission incorporated by reference the record in Case No. 2011-00138, which was a complaint case filed by the Residents' Association and Mr. Bates against JSEWD. Part of the incorporated record of that case was JSEWD's answer to the Complaint, which includes a lengthy history of the process that eventually resulted in the proposed water tank in this proceeding (Answer hereinafter referred to as "History"). By Order dated November 27, 2012, the Commission established a procedural schedule for this Application that included extensive discovery and a scheduled hearing.

As a supplemental response to discovery filed on January 4, 2013, the Intervenors filed a Report<sup>1</sup> prepared by Photo Science, Inc. ("Photo Science") which alleged that nine other alternative sites for this project should have been considered by JSEWD. With the evidentiary hearing requested by the Intervenors only several days away, JSEWD nonetheless requested a postponement of the scheduled hearing so as to make every effort to investigate the alternative sites proposed by the Intervenors. JSEWD also moved that issues relating to aesthetics and real estate values not be considered in the evidentiary hearing as beyond the scope of a CPCN

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<sup>1</sup> Exhibit 26-Forest Hills (Confidential) (Redacted version of same also filed with the Commission on the same date).

proceeding. By Order dated January 31, 2013, the Commission rescheduled the evidentiary hearing for March 13, 2013.

By Order dated March 8, 2013, the Commission incorporated by reference the Capital Improvement Plan filed by JSEWD in Case No. 2006-00156. In another Order issued on March 8, 2013, the Commission denied JSEWD's Motion to exclude evidence related to aesthetics and real estate values from the evidentiary hearing, although the Commission did state at page 4:

We caution all parties that our decision should not be interpreted as giving aesthetic concerns equal weight with other considerations. Service quality and reliability, as well as economic efficiency and cost, remain paramount considerations.

Pursuant to the Commission's Order dated March 11, 2013, JSEWD filed a report prepared by its expert witness, William L. Berkley, Jr., on that date, addressing an issue raised by the Intervenors concerning an alleged impact of the proposed water tank on real estate values in the Forest Hills subdivision.<sup>2</sup> Per that Order, JSEWD was permitted to call Mr. Berkley in rebuttal at the evidentiary hearing.

Pursuant to the Commission's procedural Order, JSEWD called four witnesses to present direct testimony: John G. Horne, L. Nicholas Strong; L. Christopher Horne; and Glenn T. Smith. The Intervenors also called four witnesses to present direct testimony: William Bates; Logan Davis; E. Clark Toleman; and Michael Ritchie. Following the conclusion of testimony, and per the procedural Order of March 11, 2013, the parties were given fourteen days from the date of the filing of the video transcript in which to file briefs.

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<sup>2</sup> Exhibit 14-JSEWD.

### III. HISTORY AND OVERVIEW OF PROPOSED PROJECT

#### A. Development of JSEWD System

JSEWD started out as a very small and very rural water district. Its entire system consisted of two distribution lines and one 50,000 gallon aboveground storage tank that essentially provided water service to farms. Since the 1980's, the nature of the system in its northwest service area has changed dramatically.<sup>3</sup> The northwest service area is located in the fastest growing section of Jessamine County that is in the top five (5) , if not number one, fastest growing counties in Kentucky for the last ten years. Its customer base has grown some 1200% from approximately 200 original customers to 2400 presently, with the vast majority of this growth having occurred since the 1980's.<sup>4</sup>

Of further significance is the type of growth that has occurred in the northwest service area. Almost without exception, recent developments have been homes on the high-end of value (\$750,000 to \$2 million) with resultant high water demands. In addition to the high water demands, this sort of development creates significant variation in demands, not just for peak days, but for peak months, with significant seasonal variation. This is demonstrated by JSEWD Exhibit 10-JSEWD, a chart depicting monthly usage in the northwest service area between August 2011 and July, 2012.<sup>5</sup>

As shown by this chart, average monthly daily use in the northwest service area varied from 507,960 gallons in November 2011 to more than double that amount in both June and July 2012 – 1,115,590 and 1,109,110 gallons respectively. It illustrates the current nature of the

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<sup>3</sup> JSEWD also provides service in an area in southeastern Jessamine County. This area remains predominately rural, has no interconnection with the northeast service area, and is not related to the proposal in this Application. No additional storage is needed for the southeast service area. Unless otherwise stated, all references in this brief are to service for the northwest service area.

<sup>4</sup> Application, Exhibit A at unnumbered page 1.

<sup>5</sup> A copy of Exhibit 10-JSEWD is attached hereto for ease of reference at Tab A.

northwest service area as it has changed from a small rural system to a growth oriented predominately high-end residential system with significant seasonal variation in usage.<sup>6</sup>

**B. History of the Proposed Project**

As noted above, a detailed History of the proposed water tank project has been incorporated by reference into this proceeding.<sup>7</sup> This History serves as a comprehensive record of events related to this project from its inception through the filing of the History in Case No. 2011-00138 in May of 2011. Without repeating all of the detail contained therein, the history of this project is as follows.

JSEWD began investigating sites and alternatives for new storage on the system in late 2000 – early 2001. JSEWD had constructed a 500,000 gallon storage tank in the mid-1990's, which in combination with an existing 50,000 gallon storage tank gave the District 550,000 gallons of installed storage capacity for the northwest service area. The new storage tank project was part of JSEWD's commitment to plan reasonably and responsibly to meet growth and increased water usage, both current and future. As part of this process, JSEWD explored a number of sites for a new storage tank. By September, 2003, several suitable sites were under consideration. Of these sites, only one owner was willing to sell a site for the intended use. This one-acre site (known as the Switzer Site) was purchased by JSEWD for \$40,000. Prior to finalizing the purchase, JSEWD paid for a geotechnical study of the Switzer Site from QORE Property Sciences. Upon receiving a favorable report from QORE, JSEWD proceeded with surveying and platting the Switzer Site and applied for an encroachment permit with the Transportation Cabinet for an access to the site from Catnip Hill Road. The one-acre parcel and a

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<sup>6</sup> A detailed summary of the growth of the JSEWD system was provided by John Horne at Video Transcript of March 13, 2013 hearing beginning at 11:38:40.

<sup>7</sup> This History was originally filed as JSEWD's Answer to a complaint filed by the current Intervenors in PSC Case No. 2011-00138. That complaint was dismissed without prejudice by Order dated October 30, 2012 in Case No. 2011-00138, but the record therein was incorporated by reference herein by Order dated November 15, 2012.



waterline/access easement from the water main on Catnip Hill Road were transferred from Sue Switzer to JSEWD by deed dated May 10, 2004.

JSEWD also planned at this time to request approval for a system development charge to help finance the water storage tank project. As part of this plan, the District directed its project engineer, Horne Engineering, Inc. (“Horne”) to prepare a capital improvement plan (“CIP”) system storage study to support a request for a system development charge. The request for a system development charge was filed with the Commission as Case No. 2006-00156, and the CIP was submitted as a filing in that case.<sup>8</sup>

In conjunction with evaluating possible alternative sites for additional storage, JSEWD initially evaluated a plan to divide the northwest service area into two pressure zones, one in the northern part of the northwest service area, and one in the southern part of the northwest service area. When it became apparent that there were no sites available in the southern part without invoking eminent domain, JSEWD focused its efforts on a single storage tank in the northern part of the northwest service area. In order for the overflow height of a new tank to match or nearly match the overflow height of JSEWD’s existing tanks, a minimum elevation for the site of 1000 feet was sought to minimize the cost of constructing a new tank. The Switzer Site was the only one of several sites under consideration that met these criteria and that was available without invoking eminent domain.<sup>9</sup> Indeed, as John Horne’s direct testimony showed, the site is

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<sup>8</sup> Case No. 2006-00156 was dismissed without prejudice to JSEWD’s right to refile the request by Order dated July 28, 2006. JSEWD chose not to refile the request. The CIP as prepared for that case has been incorporated by reference herein. JSEWD would note that filing requirements for a System Development Charge Application and a CPCN differ markedly, and that Case No. 2006-00156 was dismissed on procedural grounds, without any Commission Order finding that a CPCN for any particular storage project proposal should be approved or rejected.

<sup>9</sup> JSEWD Amended Response to FH1, #45, filed on January 14, 2013.

also ideal from an engineering and current system planning viewpoint, in that it is centered in the most intense development zone of the northwest service area.<sup>10</sup>

In addition to seeking a system development charge to finance additional needed storage capacity, JSEWD originally sought funding for the project from the United States Department of Agriculture – Rural Development (“USDA-RD”). The District also sought a state appropriation for the project, which was granted in the amount of \$1,000,000. JSEWD decided to forego USDA-RD funding for the project, as it was able to secure private financing at a lower rate, thereby reducing any potential cost to its ratepayers for the project. In all actions in this project history, the District has specifically sought to reduce the cost of the project, where reasonable and possible, in line with its philosophy that development should pay for development, additional funding sources and grants should be secured where possible, and that costs for relocations that are sought by specific customers should be avoided or paid for by those who would have the District incur such costs.

In the summer of 2005, JSEWD became aware that what eventually became the Forest Hills subdivision was being planned on a site adjoining the Switzer Site. For the next 18 months, JSEWD engaged in an extensive series of discussions with the subdivision developer about the Switzer Site and the District’s intention to build a 1,000,000 gallon aboveground water tank on that site. The District explicitly admonished the developer that he should place purchasers of lots in Forest Hills on notice that this tank was being planned for the Switzer Site.<sup>11</sup> Negotiations with the developer included a plan to relocate the site for the proposed tank to a suitable elevated spot within the Forest Hills subdivision. The developer actually commissioned a geotechnical report on this proposed site, and a written agreement was presented to the developer for his

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<sup>10</sup> Video Transcript of March 13, 2013 hearing at 12:02:00-12:04:40.

<sup>11</sup> Exhibit 1-JSEWD.

consideration. Shortly after the time the contract was tendered to him, the developer lost interest in relocating the site and did not complete this transaction because he had sold all of the lots in Forest Hills almost immediately after a UK basketball coach purchased a home in the subdivision.<sup>12</sup> Further, although JSEWD had repeatedly told the developer to advise any potential buyers of the planned water tank, Intervenor's witness, Logan Davis, testified at the hearing on this matter that he had specifically asked the developer if there was anything within the developer's knowledge that he should know about planned uses in the area prior to purchasing several lots in Forest Hills, and that he was advised by the developer that there was not.<sup>13</sup>

Following approval of a \$1,000,000 state grant for this project in April, 2008, JSEWD continued with plans for this project. In November 2009, after completion of the relocation of water mains due to the widening of U.S. 68, the District took possession of an excess quantity of 12" pipe left from this project. As testified by John Horne, this pipe was of the nature that if it was not promptly employed in a project, it would deteriorate and become unusable.<sup>14</sup> As this pipe would have been wasted had it not been quickly employed, the District used it to connect the Switzer Site to the water main on Catnip Hill Road<sup>15</sup>, thereby reducing the cost that would have otherwise been required to acquire such pipe for the proposed project.

It was apparently the presence of this pipe that resulted in Intervenor Bates inquiring into the use of the Switzer Site. Mr. Bates was fully informed by the JSEWD Board as to the intended use of the site, and that the developer of Forest Hills had been fully informed of the proposed use

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<sup>12</sup> Video Transcript of March 13, 2013, Hearing at 9:32:00 – 9:32:24.

<sup>13</sup> Video Transcript of March 14, 2013, Hearing at 11:26:41-11:27:40. Intervenor's witness, William Bates, forthrightly admitted that the developer should bear some responsibility for the Forest Hills' homeowners current situation. Video Transcript of March 14, 2013 at 11:00:26.

<sup>14</sup> Video Transcript of March 13, 2013 hearing at 16:36:40-16:38:41.

<sup>15</sup> History at page 5.

for that site. Over the next few months, Mr. Bates and several other residents of Forest Hills expressed objections to the project. The objections were primarily aesthetic in nature as well as contentions that real estate values in Forest Hills might be adversely affected by the presence of the proposed water tank. Notwithstanding the considerable effort that had already been put into selecting and evaluating the Switzer Site, and despite the fact no functional or technical issue had been raised as to the suitability of the Switzer Site for its intended purpose, the JSEWD Board decided to put the project on hold so as to consider alternatives that were proposed by the Intervenors. The Intervenors were informed from the beginning that if the site were to be relocated, the Intervenors requesting the change would be responsible for the costs involved in such relocation. At no time were the Intervenors misled by the District in this regard.

Despite the best efforts of the District, no acceptable alternative site could be agreed upon with the Intervenors.<sup>16</sup> Apparently in the spring of 2011 the Intervenors decided to forego any further discussions, and filed the Complaint that initiated Case No. 2011-00138. It is important to note that the Intervenors ended the negotiations, not the District.

After securing the state \$1,000,000 appropriation and very favorable additional funding for the remainder of the project cost, and receiving all requisite approvals for project including geotechnical assessments, environmental impact assessment, archaeological assessment, State Cleringhouse, and Kentucky Division of Water Construction Permit, JSEWD filed its Application for a Certificate of Public Convenience and Necessity on October 16, 2013.<sup>17</sup>

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<sup>16</sup> Details of the various alternatives explored by the District and the Intervenors are found in the History at pp. 5-9.

<sup>17</sup> The Intervenors appear to have some question as to whether it is reasonable to obtain such approvals prior to filing a CPCN Application. In that regard, see, Case No. 2007-00134, Kentucky American Water KRS II certificate case, Order of April 25, 2008 at pp. 78-79, which not only accepts such pre-Application activity as reasonable, but favorably compares the developed KAW proposal to an undeveloped “concept” alternative proposed by the Louisville Water Company.

The Application requests approval for the construction of a 1 million gallon elevated storage tank on the 1.0 acre Switzer Site. There is an existing 12” distribution main located adjacent to and contiguous with this tract which feeds directly to three major branches of the District’s distribution system. Among other exhibits, the District set forth a project description and information as to the public necessity for the proposed tank as Exhibit A to its Application. A detailed cost summary was filed as Exhibit B; this Exhibit also shows the HB 608 Non-Coal Grant for this project of \$1,000,000 and the KRW – Bond Issue of \$1,192,000, demonstrating that the total budgeted cost to the District for this project is \$1,192,000.<sup>18</sup> JSEWD filed plans and specifications for the project which included diagrams of the proposed construction. JSEWD has also obtained all necessary permits<sup>19</sup> for the proposed tank and site. As noted, the real property was acquired in fee simple by the District in 2004, and all necessary easements for the project (including an additional access easement to the site that is noted on the plat for the Forest Hills subdivision) have been acquired. All bids for construction of the tank were provided as Exhibit C to the Application.

During the course of the proceeding, and shortly before the scheduled evidentiary hearing on January, 10, 2013, the Intervenors filed a supplemental response which consisted of a report by Photo Science.<sup>20</sup> The Report claimed to have located additional alternative sites for the proposed water storage tank through the use of a viewshed analysis. In addition, the Intervenors had two days previously filed an information response<sup>21</sup> by E. Clark Toleman, a real estate appraiser, which contained general and unquantified allegations that the proposed tank would result in a lowering of real estate values in the Forest Hills subdivision. As shown in the History,

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<sup>18</sup> Exhibit B to the Application attached hereto for ease of reference at Tab B.

<sup>19</sup> See Exhibit D to JSEWD’s Application.

<sup>20</sup> Exhibit 26-Forest Hills (confidential)(( a redacted version of this report was filed with the Commission on the same date).

<sup>21</sup> Intervenors’ Response to JSEWD2#3(a)

JSEWD had already conducted a thorough and more than reasonable analysis of alternative sites for this project, and did not (and does not) believe that such issues should be further considered in a CPCN application for a water storage tank. However, in a further good faith effort to address the concerns raised by the Intervenors, JSEWD requested a postponement in the scheduled hearing to review and investigate the Intervenors' claims. After a thorough examination of the alternative sites proposed by Photo Science, JSEWD filed a Report prepared by John G. Horne of Horne Engineering, Inc.<sup>22</sup>, which conclusively demonstrates that the Switzer Site is not only an appropriate site for the proposed tank, but is the most appropriate site.<sup>23</sup> In addition and in accordance with the Commission's scheduling Order of March 11, 2013, JSEWD filed a Report authored by William L. Berkley, Jr.<sup>24</sup>, which established through an empirical market analysis of actual, arms-length sale transactions that there is no evidence that a view of the proposed tank would have any impact on real estate values in a subdivision such as Forest Hills. Both Mr. Horne and Mr. Berkley appeared to testify at the March 13-14, 2013, evidentiary hearing (Mr. Berkley as a rebuttal witness), and their testimony corroborated and further supported and explained the Reports that they filed.

#### **IV. ARGUMENT**

##### **A. JSEWD'S Request for a Certificate of Public Convenience and Necessity Should Be Granted.**

This Application is filed pursuant to KRS 278.020(1), which states as follows:

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

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<sup>22</sup> Exhibit 8-JSEWD.

<sup>23</sup> Matrix, part of Exhibit 8-JSEWD, attached hereto for ease of reference at Tab C.

<sup>24</sup> Exhibit 14-JSEWD.

person has obtained from the Public Service Commission a certificate that public convenience and necessity require the service or construction. . . .

“Public convenience and necessity” has been interpreted by Kentucky’s highest court to mean that a proposed facility or service is needed, and that the proposed facility or service will not result in “wasteful duplication”.<sup>25</sup>

“Need” requires:

A showing of substantial inadequacy of existing service, involving a consumer market sufficiently large to make it economically feasible for the new system or facility to be constructed or operated.

...{T]he inadequacy must be due ... to a substantial deficiency of service facilities, beyond what could be supplied by normal improvements in the ordinary course of business...<sup>26</sup>

“Wasteful duplication” is defined as “an excess of capacity over need” and “an excessive investment in relation to productivity or efficiency, and an unreasonable multiplicity of physical properties.”<sup>27</sup>

With respect to these standards, the Commission in this proceeding has stated that the paramount considerations with respect to the requested CPCN are service quality and reliability, as well as economic efficiency and cost.<sup>28</sup> As will be demonstrated herein, the proposed project meets all of these standards, and the requested CPCN should be granted.

### **1. PSC Regulatory Requirements**

807 KAR 5:066, Section 4(4) provides that a water utility shall have, at a minimum, sufficient storage to meet average daily consumption. The uncontested evidence in this case

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<sup>25</sup> *Kentucky Utilities Co. v. Public Service Commission*, 252 S.W. 2d 885, 890 (Ky. 1952).

<sup>26</sup> *Id.* At 890.

<sup>27</sup> *Id.*

<sup>28</sup> Order of March 11, 2013 at page 4.

demonstrates that JSEWD is not in compliance with this requirement absent the addition of new storage. As noted in the Application, Exhibit A, JSEWD has already experienced an average annual daily use of 709,200 gallons for the northwest service area, while its current installed storage capacity is 550,000 gallons. JSEWD clearly needs additional storage.

The Intervenors appear to argue that since JSEWD's proposal would result in more storage capacity than the absolute minimum required by 807 KAR 5:066, Section 4(4) as determined by an average annual daily consumption, the Application should be refused without further analysis.<sup>29</sup> Further, the Intervenors argue that 807 KAR 5:066 and orders interpreting that regulation are the only standards for determining the appropriate capacity for a proposed water tank.

The Intervenors' position is severely flawed and narrow for several reasons. To begin with, the actual language of 807 KAR 5:066, Section 4(4) is as follows:

(4) Storage. The minimum storage capacity for systems shall be equal to the average daily consumption.

The first and most obvious thing to note about this regulation is that "average daily consumption" is the minimum storage capacity to be maintained. By this standard, even if only average annual daily consumption is examined, there is clearly a need for new storage on the JSEWD system. Otherwise, JSEWD is out of compliance with 807 KAR 5:066, Section 4(4). As the need for new storage has been established, the only issue is whether some level of storage in addition to the absolute minimum is necessary, and whether the proposed storage tank is the best alternative to provide such storage.

Less immediately obvious, but equally correct, is that this section does not limit consideration of minimum storage requirements to "average daily consumption" determined on a

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<sup>29</sup> See, Intervenors' Response to JSEWD1#4.



yearly basis. JSEWD also maintains records on “average daily consumption” figured on a monthly basis. As “average daily consumption” is not defined by 807 KAR 5:066, Section 4(4) as being limited to an average determined on an annual basis, average daily consumption as determined on a monthly basis is equally compliant with 807 KAR 5:066, Section 4(4) in determining minimum storage capacity. Such an analysis based on monthly demand is more applicable and necessary for a utility such as JSEWD that has pronounced seasonal and daily variations in demand.

JSEWD maintains records sufficient to determine “average daily consumption” on a monthly basis. It is required to do so by 807 KAR 5:066, Section 6. The basic measurement required by this regulation is monthly usage – annual usage is only an aggregation of the required monthly data. Indeed, the Intervenors requested such monthly data in this proceeding.<sup>30</sup>

Commission regulation also provides that storage must be sufficient so as not to interfere with, or “bottleneck”, provision of water service to meet maximum requirements of the relevant utility system. 807 KAR 5:066, Section 10, Construction Requirements, states in Section 10(3) as follows:

(3) Transmission systems. Transmission pipe lines from sources of supply shall be designed to deliver in combination with related storage facilities and to the limits of the capacity of those sources of supply the maximum requirements of that portion of the system which is dependent upon such transmission pipe lines.

This regulation recognizes that “related storage facilities” must also be capable of meeting maximum requirements “in combination with adequately sized transmission lines”. This elementary point must also be considered in determining the proper sizing for a needed storage

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<sup>30</sup> JSEWD Response to Intervenors1#26.

facility, and requires a far more comprehensive and system specific analysis of the sizing requirements for a water tank than is suggested by the Intervenors.<sup>31</sup>

The proper analysis of sizing must also take into consideration the necessity for JSEWD to provide adequate service to its customers. KRS 278.030 states, in relevant part:

**278.030 Rates, classifications and service of utilities to be just and reasonable -- Service to be adequate -- Utilities prohibited from energizing power to electrical service where seal is not present.**

**(2) Every utility shall furnish adequate, efficient and reasonable service,** and may establish reasonable rules governing the conduct of its business and the conditions under which it shall be required to render service. **[emphasis added]**

JSEWD is a utility, and is required to furnish adequate service to its customers. As defined by KRS 278.010(14):

(14) "Adequate service" means having sufficient capacity to meet the maximum estimated requirements of the customer to be served during the year following the commencement of permanent service and to meet the maximum estimated requirements of other actual customers to be supplied from the same lines or facilities during such year and to assure such customers of reasonable continuity of service<sup>32</sup>

JSEWD is required by statute to have sufficient capacity to meet maximum customer demands and to assure its customers of "reasonable continuity of service". JSEWD's proposed storage tank is both reasonable and necessary to comply with these statutory requirements.

The Commission has also promulgated 807 KAR 5:066, Section 10(4), which provides that "[t]he quantity of water to be delivered to the utility's distribution system from all

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<sup>31</sup> For example, the Ten States Standards referred to in this proceeding by Intervenors provide that design criteria for proposed waterworks projects should include "d. estimated average and maximum day water demands for the design period." Section 1.4, Design Criteria.

<sup>32</sup> The Commission has interpreted this definition to mean that such adequacy will include service during drought conditions, but not for "unrestricted" demand. As noted in the definition, adequate service is for reasonable customer demands. PSC Case No. 2007-00134, Kentucky-American Water Company Application for CPCN for KRS II, Order of April 25, 2008 at page 33.

source facilities shall be sufficient to supply adequately, dependably and safely the total reasonable requirements of its customers under maximum consumption.” The Commission has interpreted this regulation to include provision of service for reasonable customer uses under drought conditions as well as normal conditions.<sup>33</sup>

In determining the proper sizing for a proposed water tank, then, the Commission should properly consider at least the following factors as reasonable for a particular system pursuant to its existing regulations and statutes:

- Average annual daily consumption
- Average monthly daily consumption
- Peak daily consumption, particularly where such peaks regularly exceed average daily usage and installed capacity by significant amounts
- Significant variations in seasonal or periodic demand
- Planning to provide adequate service under both normal and drought conditions
- Redundancy for outages, emergencies, maintenance and system reliability

## **2. Application of Relevant Statutes and Regulations**

In the period from August 2011 through July 2012, JSEWD experienced actual average annual daily use of 709,200 gallons.<sup>34</sup> This average annual daily use exceeds JSEWD’s installed storage capacity of 550,000 gallons. JSEWD is out of compliance with the Commission’s minimum storage requirements even under the most restrictive possible reading of 807 KAR 5:066, Section 4(4). In every month except November 2011 and March 2012, the

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<sup>33</sup> See, Case No. 2007-00134, Kentucky-American Water Company (KRS II), Order of April 25, 2008.

<sup>34</sup> Unless otherwise noted, all usage numbers come from Exhibit 10-JSEWD, page 2, which was originally attached to JSEWD’s Application as Exhibit A.

average monthly daily use exceeded JSEWD's current installed storage capacity. Daily usage exceeded installed capacity in 228 days, or 65% of the days in the twelve month period.

Average monthly daily use for June 2012 and July 2012 was 1,115,590 gallon and 1,109,110 gallons respectively. These numbers are significant, first because they are average daily usage numbers that are consistent with assessing minimum storage requirements pursuant to 807 KAR 5:066, Section 4(4), but even more importantly because they demonstrate that for two consecutive months of actual usage in 2012, JSEWD's average daily usage exceeded its installed capacity plus the addition of a 500,000 gallon tank, which might be considered as an alternative to the 1.0 MG proposed by JSEWD. Without even taking into account any capacity for growth, the ability to meet reasonable demands in a prolonged or severe drought, redundancy, or any other factors that the Commission has previously determined are all relevant and necessary for water system improvements, JSEWD's current average monthly daily usage demonstrates that at minimum, a tank larger than 500,000 gallons is needed.

Maximum day use exceeded installed capacity for each month reported. In fact, even minimum day use exceeded installed capacity in August 2011 and July 2012, and approached system storage capacity in June 2012. It is further significant to note that maximum day use exceeded 1,550,000 gallons in May, June and July of 2012. This means that the maximum day use in each of those months has already exceeded total current installed capacity plus the proposed one million gallon tank. Maximum day use also significantly exceeded 1,050,000 gallons (current installed capacity plus an additional 500,000 gallon tank) in August, September and November 2011.

The record further illustrates the extent to which the JSEWD system is significantly deficient in storage capacity. JSEWD presented uncontested evidence analyzing use demand

over a period from 2001 through November 2012.<sup>35</sup> During this period, there were 364 days in which demand exceeded 1,050,000 gallons. Further, there were 38 days where demand exceeded 1,550,000 gallons. Indeed, on July 1, 2012, JSEWD experienced a demand of 1,929,375 gallons, followed seven days later by a demand of 1,806,000 gallons. As noted in that Response and confirmed in John Horne's direct testimony, from an engineering perspective JSEWD's source of supply for its distribution system is its water storage tanks. While the JSEWD system has booster pumps, those pumps are designed to work intermittently as water in the tanks drops to certain levels. These pumps are not intended or designed to run continuously. JSEWD has conclusively demonstrated through uncontested evidence that a 1.0 MG storage tank is needed to provide adequate service to the customers in JSEWD's northwest service area.

The uncontested record in this proceeding demonstrates that the JSEWD system is significantly deficient in storage. It is deficient by any measure. The addition of a smaller tank will not resolve this deficiency – indeed, if a 500,000 gallon tank is added, it is already insufficient to meet experienced average monthly daily use demands, let alone the very large and continuing number of daily demands that significantly exceed 1,050,000 gallons.<sup>36</sup> The addition of a 500,000 gallon tank would at best a band-aid fix and only postpones for a very short period of time the need for an additional 500,000 gallon or larger tank, at significantly higher cost than the proposed 1 million gallon tank. JSEWD respectfully submits that the evidence in this proceeding fully justifies the approval of the proposed tank solely to meet current and proven

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<sup>35</sup> Exhibit 12-JSEWD, originally JSEWD Response to Intervenors2#27.

<sup>36</sup> As to importance of maximum demands in water tank sizing, *see* Kentucky-American Water Company 2002 Water Storage Analysis at page 3 – “The capacity of distribution storage is based on the **maximum water demands** in different parts of the system. **[emphasis added]**” Similarly, JSEWD must have sufficient storage to meet maximum water demands in the northwest service area. This study was filed by KAW in Case No. 2005-00039, a CPCN Application for a proposed water storage tank, and was received by the Commission on July 23, 2004 and cited by the Commission in its final Order in that case, Order dated April 21, 2005 at page 3, n. 8.

system needs, even before factoring in growth, preparation for an extended drought, redundancy, and other factors.

### **3. Storage Standards – Case No. 2012-00096**

On February 28, 2012, The Commission issued its Order in a case involving an Application for CPCN by Kentucky-American Water Company (“KAW”).<sup>37</sup> This case (hereinafter referred to as “KAW-Northern Division”) requests a CPCN for a very large project that includes constructing at least two new storage tanks with a combined capacity of 900,000 gallons.<sup>38</sup> The project involves providing service to KAW’s Northern Division. This case and Order discusses some issues and makes some findings that are directly relevant to JSEWD’s Application and the standards to be applied for a CPCN Application for a water storage tank.<sup>39</sup>

Issues that are relevant to both cases include:

- a. KAW’s design criteria for the new “Monterey Tank” include a large enough capacity to provide service in the Northern District in the event that KAW’s KRS II

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<sup>37</sup> KAW Application for a CPNC, Case No 2012-00096, Order of February 28, 2013. The Attorney General has filed what he styles as a Petition for Reconsideration in that case, but specifically states that the purpose of the AG’s Petition is to clarify his position in the case, not to seek rehearing regarding the Commission’s final determination. By Notice dated March 25, 2013, KAW stated its intention to begin construction immediately (on or after April 1, 2013) pursuant to the Order of February 28, 2013. This Order is in full effect unless revoked or modified by the Commission or a court of competent jurisdiction per KRS 278.390.

<sup>38</sup> KAW also considered, but rejected, an alternative “refurbishment” plan that would have resulted in a new 1.0 MG storage tank being constructed, further demonstrating the close convergence between the storage portion of KAW’s Application and the JSEWD proposal in this case. The need for a new 1-million-gallon storage tank in the “refurbishment” alternative is discussed in Case No. 2012-00096, KAW\_R\_PSCDR#60\_072312, page 28 of 28. This tank is not included in the CPCN granted by the February 28, 2013 Order, and presumably is not in KAW’s plans for the Northern District. It does, however, show that KAW believed that a tank of exactly the same capacity as that requested by JSEWD would have been justified to serve the Northern District’s system and customer demands.

<sup>39</sup> To the extent that reference to various documents in the KAW-Northern case requires, JSEWD requests that the relevant documents in Case No. 2012-00096 be incorporated by reference into this proceeding. Should the Commission so desire, JSEWD has no objection to the entire record in Case No. 2012-00096 being incorporated herein by reference.

plant should experience a three-hour outage.<sup>40</sup> JSEWD's proposed water tank will provide similar capacity for JSEWD's customers. As JSEWD's main treated water connection is from KAW, the same criteria requires sufficient capacity to meet an outage at KRS II or other interruption of supply from KAW.

b. KAW's parent, American Water Works ("American Water"), uses storage criteria that include an analysis of sufficiency to meet peak demand conditions. In this regard, American Water states:

- **Distribution Storage** – Storage facilities are considered adequate if the effective volume of the facility, or groups of facilities acting together, provide sufficient volume to meet equalization needs and a fire protection reserve (if necessary) during **maximum day demand events [emphasis added]**. In addition, State regulations are also considered as they relate to a particular distribution system.<sup>41</sup>

Similarly, the record in this case fully supports the proposed water tank as necessary to meet maximum day demand events. Per American Water, storage capacity is not adequate if it is unable to meet customer needs during maximum day demand events.

c. The projected maximum daily demand for the KAW Northern Division is projected to be 1.83 mgd per day in 2013<sup>42</sup>. Maximum daily demand in the JSEWD northwest service area has already exceeded this demand. On July 1, 2012, JSEWD had a maximum day demand of 1,929,375 gallons.<sup>43</sup> JSEWD has already experienced a maximum day

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<sup>40</sup> Case No. 2012-00096, KAW-R-PSCDR1#52-072312.

<sup>41</sup> Case No. 2012-00096, KAW\_R\_PSCDR#60\_072312, Page 20 of 28.

<sup>42</sup> Case No. 2012-00096, KAW\_R\_PSCDR1#27\_072312, attached hereto for easy reference at Tab D.

<sup>43</sup> JSEWD Response to Intervenors2#27, page 35 of 38.

demand that is not even projected to occur in the KAW Northern District until 2018<sup>44</sup>. In approving the CPCN, the Commission has approved 900,000 gallons of new storage for KAW to assist in meeting the projected demands, even though the KAW Northern Division already has some 1.096 million gallons of installed storage capacity, and will have at least 1,879,000 gallons of storage capacity as a result of the approval of the requested CPCN.<sup>45</sup> As stated by Mr. Horne in his response<sup>46</sup>, the one million gallon tank proposed by JSEWD to add to its current 550,000 gallons of installed storage capacity for a total storage capacity of 1,550,000 gallons is conservative, particularly compared to the new storage approved for KAW to serve its Northern Division to meet a significantly smaller maximum day demand.

KAW has thus been approved for storage capacity that exceeds its projected demands through at least 2018. By contrast, even with the addition of the proposed 1,000,000 gallon tank, JSEWD's installed capacity will be almost 400,000 gallons less than its already experienced maximum day demand. JSEWD's proposed tank is clearly reasonable to meet this demand.

The Order in Case No. 2012-00096 does not make a finding as to the average annual day consumption in the Northern Division, so it is not possible to directly compare the approved storage capacity to average annual daily demand. The Order does find that the average daily production of the Northern Division's current primary source for treated water, the Owenton Water Treatment Plant, is 830,000 gallons per day. Even assuming that the proposed standpipe

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<sup>44</sup> Case No. 2012-00096, KAW\_R\_PSCDR1#27\_072312; indeed, KAW's brief suggests that "[e]ven under the hottest and driest of scenarios, the maximum day demand expected from the Northern Division in 2025 is just over 2 million gallons". Case No. 2012-00096, KAW Brief at page 12.

<sup>45</sup> Case No. 2012-00096, Order of February 28, 2012 at page 8; although KAW intends at some point to take a 400,000 gallon tank offline for repairs, it will be returned when repairs are completed. KAW also stated that it intends to decommission a 117,000 gallon standpipe at some point; assuming that this in fact occurs, total KAW storage capacity for the Northern Division will be 1,879,000 gallons as a result of the approval of the CPCN. In the "alternative" plan considered and rejected by KAW solely due to creating more O&M expense over time, storage capacity would have been at least 1,979,000 gallons.

<sup>46</sup> JSEWD Response to Intervenors2#27.



retirement in fact occurs, the approved storage capacity for KAW's Northern District will more than double the average daily production produced by the Owenton Water Treatment Plant.<sup>47</sup> As shown above, JSEWD needs more storage capacity than does KAW's Northern Division to meet maximum day demands that have already occurred on the JSEWD system, demands that are not even projected to occur on the Northern Division until 2018 at the earliest. The recent findings in Case No. 2012-00096 are fully consistent with, and indeed fully support, both the need for and the sizing of JSEWD's proposed water tank.

d. KAW specifically states that its proposed new storage tanks are needed to provide redundancy to the Northern Division.<sup>48</sup> In particular, KAW states that “[a]ll three of these components [**including the two new storage tanks**] in addition to KRSII and the existing distribution system storage tanks will provide redundancy to the Northern Division.”**[interjection added]**<sup>49</sup> This same need applies to, and supports the need for, the proposed JSEWD water tank.

e. In the JSEWD Application, the Intervenor's questions at the hearing appeared to be stating or implying that KAW has excess storage capacity that could be used to meet JSEWD's storage needs. There is no evidence in the record, or in any prior Order of which JSEWD is aware, to support such a claim, or to support any argument that KAW has constructed storage to exceed storage capacity that is needed for its own system or to provide a

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<sup>47</sup> Case No. 2012-00096, Order of February 28, 2013 at page 4. The Commission also footnoted a higher average daily production at the Owenton WTP of 929,800 for 2011. Even this average daily production results in an installed treatment capacity post-CPCN that more than doubles the average daily production at the WTP. The Northern Division also purchases relatively small quantities of water from other sources, but even if all purchased water is included, the approved installed capacity post CPCN far exceeds the average annual day treated water supply for the Northern Division. This demonstrates that the Intervenor's suggestion that sizing a water tank involves only the 807 KAR 5:066(4) (4) minimum standard (as interpreted by the Intervenor) is not a practical standard for sizing a new storage facility to meet actual system needs.

<sup>48</sup> Case No. 2012-00096, KAW\_R\_PSCDR1#30\_072312, Responses (d) and (e); see also Order of February 28, 2013 at pg. 14; see also KAW\_R\_AGDR1#17\_072312.

<sup>49</sup> Case No. 2012-00096, KAW\_R\_PSCDR1#30(d).

reserve for JSEWD. Further, in the KAW-Northern Division case, KAW specifically stated that “[t]he improvements were designed to provide service to existing customers and provide for growth within the existing service area of the Northern Division.”<sup>50</sup> While questions may have been raised in prior KAW proceedings about alleged excess treatment capacity, JSEWD is unaware of any claim that KAW has constructed excessive storage capacity that might be available to JSEWD. The response in the KAW-Northern Division case indicates that KAW constructs storage for its own internal needs, not to expand into providing storage service to other utilities. This is completely consistent with KAW’s contract with JSEWD, which unambiguously states that KAW will not provide storage capacity to JSEWD, and that JSEWD is responsible for providing sufficient storage to meet its customers’ needs.

f. KAW received all necessary permits for its Northern Division project prior to filing its application.<sup>51</sup>

g. KAW agrees with JSEWD that there is no need to consider options or alternatives that are not viable.<sup>52</sup>

The Commission approved a CPCN for the KAW-Northern Division project, including the proposed 900,000 gallons in new storage. All of the criteria stated above at least equally support the granting of a CPCN for JSEWD’s proposed water storage tank. JSEWD’s sole consideration for this Application is having sufficient capacity to continue to provide adequate service and system reliability for its customers.

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<sup>50</sup> Case No. 2012-00096, KAW\_R\_AGDR1#1\_072312, Response (A).

<sup>51</sup> Case No. 2012-00096, Direct Testimony of Lance E. Williams, P.E., at page 10.

<sup>52</sup> Case No. 2012-00096, KAW\_R\_AGDR#11\_072312, Response (D).

#### 4. Service Area Growth

In the CIP prepared by Horne Engineering and filed in Case No. 2006-00463, JSEWD detailed the extent and type of growth that had occurred in the northwest service area, and stated that JSEWD expected that both the residential nature and extent of this growth would continue in the northwest service area. The Intervenors have referred to staff comments in an informal conference memo in that case (which was not a CPCN case, has different filing and approval standards, and which never progressed to a Commission Order on the merits) to allege that the CIP was inadequate to demonstrate that growth would continue.

JSEWD presented an exhibit to demonstrate that significant high-use residential growth has continued in the northwest service area as predicted by the CIP. While on average growth has consisted of the addition of approximately 39 meters per year rather than the 55-65 predicted in the CIP, this growth occurred despite the greatest recession since the great depression, with its devastating effect on most housing markets and real estate development. As noted by Mr. Horne, growth in meters has returned to higher levels in the last year, and Mr. Horne anticipates that growth will continue in the northwest service area for the same high-end residential uses, although possibly at a lower rate of increase than projected in the CIP.<sup>53</sup>

John Horne has a long history of involvement with development in the northwest service area, in both water system development and subdivision development. He is in a unique position, both from training and experience, to testify as to expected growth in the northwest service area. Particularly given the steady increase in high-end residential meter growth even during this terrible period of economic decline, and the lack of any testimony contesting his analysis, his testimony is highly credible and should be given great weight in the Commission's deliberations.

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<sup>53</sup> Exhibit 7-JSEWD.

## **5. Paramount Considerations**

With respect to the Commission's paramount considerations of service quality and reliability, as well as economic efficiency and cost<sup>54</sup>, the proposed tank satisfies each consideration. As noted by JSEWD witness John Horne, the JSEWD system is a master meter type system with booster pumps. JSEWD has no production capacity of its own. In this type of system, JSEWD's source of supply for its distribution system is its water storage tanks.<sup>55</sup> The system is very well designed to provide adequate service to the northwest service area as long as JSEWD has adequate storage for that purpose. As John Horne testified, the current JSEWD distribution system has constantly improved and expanded over the original minimal rural farm system, and is now fully capable of meeting reasonable customer demands for the type of system that it has become in the northwest service area – a predominately high-use, high-value residential area with continuing growth in demand, both average and peak.

The entire delivery system, however, is dependent on adequate storage capacity. JSEWD has recognized for many years that additional storage would be necessary, and has taken reasonable actions to both procure a site for such storage and to plan such a project, including assuring that the project has received requisite approvals.

### **SERVICE QUALITY AND RELIABILITY**

As shown above, the proposed water tank is needed so as to allow JSEWD to continue to provide quality water service and to enhance and assure continued reliability. The proposed tank will secure service quality and reliability on the JSEWD system for current needs, as well as for growth on the system, although as Mr. Horne has stated, even the 1 million gallon

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<sup>54</sup> As noted in the Commission's Order of March 11, 2013 at page 4.

<sup>55</sup> JSEWD Response to Intervenors2#27, particularly at pg 35 of 38.

tank may actually be conservatively sized.<sup>56</sup> The proposed tank will add to reliability on the JSEWD system by supplying redundancy for the storage system. While JSEWD's current storage tanks are well maintained and in excellent operating condition, should a total outage occur for any significant interval, water service will be adversely affected. Even a partial outage will affect service quality and reliability, particularly given the significant peak monthly and recurring daily demands placed on the JSEWD system as discussed above. Further, should a short term disruption occur at one or both of the points of connection for treated water, the proposed water tank will give JSEWD the ability to meet reasonable customer demands for a significantly longer period than current capacity will allow. The proposed tank will allow JSEWD's system to operate at a much higher level of engineering efficiency, by reducing the demand on the system's pumps to their intended intermittent use.

### **ECONOMIC EFFICIENCY AND COST**

JSEWD's proposed project is both economically efficient and cost effective in providing adequate service to the northwest service area. As previously noted, JSEWD had considered establishing two pressure zones in the northwest service area, which would have required two 500,000 gallon storage tanks. By proceeding with the single one million tank proposal instead, the economic efficiency of this project is dramatically increased. Only one site is required. The incremental cost of "sizing up" a storage tank from a half million gallon tank to a million gallon tank is \$299,700.00, or an increase of 23% in cost over a 500,000 gallon tank. This equates to a very desirable 4.3:1 cost benefit ratio. The cost of two half million gallon tanks would be \$1,025,300 more than a single 1,000,000 tank.<sup>57</sup> The construction of the proposed one

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<sup>56</sup> *Ibid.*

<sup>57</sup> Exhibit 11-JSEWD.

million gallon tank rather than two 500,000 gallon tanks is by a wide margin the least cost solution to JSEWD's storage needs.

Further, JSEWD has secured a \$1,000,000 grant for this project, reducing by almost 50% the cost of the proposed tank to JSEWD and its ratepayers. If instead two 500,000 gallon tanks were constructed, the entire state appropriation would only cover the incremental cost of constructing two tanks rather than one, thus drastically and wastefully reducing the benefit of that appropriation to the JSEWD system and its customers. As the Commission has recognized, the appropriate measure of cost in a CPCN proceeding is the cost as seen by customers. The combination of grant funding, low incremental cost for the additional 500,000 gallons of capacity for a one million gallon tank, and the very low cost financing secured by JSEWD for the rest of the project cost, means that ratepayers will not see any adverse rate impact from this project.<sup>58</sup>

In terms of economic efficiency, the northwest service area customers will be assured of reliable service for the foreseeable future without any adverse rate impact. The proposed tank will meet annual average daily demands, monthly average daily demands and most if not all peak day demands in an economically efficient and cost effective manner.

#### **6. Avoidance of "Wasteful Duplication"**

While avoidance of wasteful duplication is in some ways related to the analysis already provided above, it is also considered to be a separate consideration that must be satisfied in order for a CPCN to be granted. To the extent that "wasteful duplication" is the same as economic efficiency and cost, please see the discussion above. Also, it is important to note that the Intervenors in this proceeding have not presented any testimony, expert or otherwise, to challenge the need for this proposed tank.

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<sup>58</sup> JSEWD Response to Intervenors1#33.

The Commission has previously held that utilities seeking a CPCN should address alternatives that were considered as part of the process of demonstrating that a proposed facility will not result in wasteful duplication. The Intervenors have raised numerous objections to the site for the proposed tank, which will be discussed further below. However, it is JSEWD's understanding that this discussion of "alternatives" is actually intended more to be a consideration of functional alternatives to the proposed facility, and that siting would only be an issue in this functional analysis if the proposed site had technical or other flaws that would prevent proper functioning of the proposed facility for its proposed purpose. In this regard, it is important to note that the record in this proceeding is devoid of any suggestion that the Switzer Site has any technical, geophysical, or other functional deficiencies for its intended purpose. As noted, JSEWD has engaged in numerous reviews of alternate sites for the proposed tank, both before and since its acquisition of the Switzer Site.

Adequate storage is essential to the proper functioning of the JSEWD system. The only alternative to provide adequate storage is to add storage. Siting issues are not an alternative to needed storage – they only address where the needed storage will be sited. The only feasible alternative for JSEWD's proposed storage tank is some other storage tank plan.

As previously discussed, JSEWD considered and abandoned a plan to establish two pressure zones for the northeast service territory. Any such plan would have required two storage tanks rather than one, at significantly higher cost. Two pressure zones are not needed. The proposed tank is sufficient to produce the same benefits to the system at a much lower cost. Even if JSEWD were not permitted to use the Switzer Site for this project, the proposed one million gallon tank would still be the most economically efficient and cost effective way to add needed storage to the JSEWD system.

When asked how the proposed water tank would result in wasteful duplication, the Intervenors' only response was that there will be wasteful duplication "because it is not needed."<sup>59</sup> When asked to state any support for a contention that a superior alternative to the proposed tank exists that is "technically superior, less costly, and more efficient than the proposed water tank", the Intervenors responded only that their investigation "may reveal superior alternatives".<sup>60</sup> When requested to provide any alternatives that the Intervenors were prepared to offer to the proposed tank, the Intervenors again refrained from answering, citing their continuing investigation.<sup>61</sup>

The record herein is clear that the Intervenors failed to offer any functional alternative to the proposed water tank prior to the evidentiary hearing. The only "alternatives" offered by the Intervenors were either siting alternatives or (to the extent that such a response can be considered an alternative) that no storage be added at all. JSEWD can only conclude that the Intervenors' investigation did not reveal any alternative to the water tank other than having JSEWD continue to be in noncompliance with Commission regulations and lacking sufficient storage capacity to provide adequate and reliable service to its customers.

In an apparent last minute attempt to suggest that Kentucky-American Water Company ("KAW") could be an alternative storage supplier for the northwest service area, the Intervenors questioned Mr. Horne at the hearing about the possibility of KAW reserving storage for JSEWD. No foundation had been laid for such questioning. There is no evidence in the record that KAW has any excess storage capacity that it would even consider reserving for JSEWD. Indeed, KAW for many years operated under a deviation from the minimum storage

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<sup>59</sup> Intervenors' Response to JSEWD1#4(d).

<sup>60</sup> Intervenors' Response to JSEWD1#4(e).

<sup>61</sup> Intervenors' response to JSEWD1#5. Indeed, the Intervenors have refused to assume even *arguendo* that the tank is needed.



requirements of 807 KAR 5:066(4)(4), and while KAW has added storage in recent years, the Orders approving such storage have approved such capacity for KAW's own system needs, not to construct storage to reserve capacity to meet JSEWD's storage needs. Maximum demands on KAW's storage would almost certainly coincide with maximum demands on JSEWD's system, diminishing even further the possibility that KAW could reserve any storage capacity for JSEWD that would actually be available when most needed.<sup>62</sup> The Intervenors were made aware early in this proceeding that the longstanding supply contract between KAW and JSEWD explicitly states that KAW will not provide any reservation of storage capacity, and that JSEWD shall provide elevated storage as necessary to "provide adequate service to its customers [**emphasis added**]"<sup>63</sup>.

The final blow to the Intervenors' late KAW "alternative" came when the Intervenors suggested to both John Horne and Christopher Horne that KAW's two 3 million gallon ground storage tanks near Clays Mill Road could supply any needed storage for the JSEWD system. Both Messers. Horne clearly stated that the elevation of those ground storage tanks is far too low for such storage to be useful in supplying the JSEWD system. This proposed "alternative" is not at all technologically feasible, even if KAW has excess capacity to reserve. There is simply no viable KAW alternative here. Any implication by the Intervenors that this Application should be rejected because JSEWD did not engage in a futile gesture is unreasonable<sup>64</sup> and ignores the pressing reality that JSEWD needs to add storage – and soon – to provide adequate and reliable

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<sup>62</sup> Technical issues with assuming that KAW storage would be available and useful to JSEWD were discussed at length by Christopher Horne at Video Transcript of March 14, 2013 hearing at 9:03:38-9:08:02.

<sup>63</sup> Service contract between KAW and JSEWD is on file with the Commission in accordance with PSC regulations; a copy is attached hereto for ease of reference at Tab E.

<sup>64</sup> As noted above, KAW agrees with JSEWD that there is no need to waste time and resources on considering options or alternatives that are not viable. See, discussion of KAW arguments, Case No. 2012-00096 in section 3(e) above.

service to its northwest service area customers, including the Intervenors. The KAW “alternative” is a red herring.<sup>65</sup>

The Intervenors are surely aware of how alternatives have been presented in prior CPCN proceedings. In the KRSII proceeding, for example,<sup>66</sup> the Louisville Water Company appeared and presented an actual alternative that it claimed to be capable of providing. In that case, the Commission rejected the alternative, in part because the alternative was vague and not fully developed, while KAW’s plan had been fully developed including obtaining necessary permits and sites. As KAW stated, its “proposed solution is the right solution for KAW customers for all of the numerous reasons that have been demonstrated in this case, including the reason that it is the most timely (sic) solution and, therefore, minimizes KAW’s customers’ risks.”<sup>67</sup>

To the extent that the Intervenors are implying that this Application should be rejected because a third party not a party to this proceeding might have been contacted for some alternative that might somehow be possible despite all evidence to the contrary, legal restrictions, and total technological infeasibility, is a complete confirmation that the Intervenors have no reasonable functional alternative to the propose tank to suggest, despite having formally protested this tank proposal since May, 2011. JSEWD respectfully recommends that the Commission view this failure to advance any feasible functional alternative to the proposed tank as confirmation that JSEWD has met the absence of wasteful duplication standard. The “wasteful duplication” standard should not be misapplied as suggested by the Intervenors so as to meet the Intervenors’s obvious actual aim in this proceeding, which is to somehow relocate the tank site at no cost to the Intervenors, but at the expense of other customers.

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<sup>65</sup> *Ibid.*

<sup>66</sup> PSC Case No. 2007-00134.

<sup>67</sup> *Ibid.*, KAW Brief at page 45.

**7. Water Quality and Storage Capacity**

At the evidentiary hearing, the Intervenor questioned JSEWD witnesses John Horne and Christopher Horne as to whether the water tank proposed by JSEWD could create water quality issues due to lack of turnover of water in the proposed tank. As stated by Christopher Horne, water quality could be a problem if water were allowed to stagnate in the tank. However, telemetry controls on water levels can be set to prevent such a condition. As discussed by Messers Horne, depending on the season and the expected storage requirements, the tank levels (and conversely volume) can be set by telemetry which then would result in daily turnover. It should be noted that stored water quality is not predicated on daily turnover as a minimum. Rather quality is more dependent on temperature; consequently, winter storage is longer than summer. District personnel read the master meters daily, therefore they are in a position to closely monitor use and adjust storage accordingly. JSEWD will continue to meet or exceed all relevant water quality standards.<sup>68</sup>

**B. THE SWITZER SITE IS THE MOST APPROPRIATE SITE FOR THE PROPOSE WATER TANK**

**1. Relevance and Weight of Intervenor's Aesthetics and Real Estate Concerns**

The Intervenor has alleged that aesthetic concerns and concerns about real estate values are proper issues in a CPCN proceeding for a proposed water tank under KRS 278.020(1). JSEWD filed a motion to limit such issues in this case, and will not reiterate its arguments raised therein; rather JSEWD incorporates its Motion and related pleadings herein by reference.

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<sup>68</sup> See, for example, Video transcript, 3/14/13 at 9:32:57-9:35:00; further discussion of turnover and actual system operation at Video Transcript 3/14/13 at 9:42:00-9:47:44; JSEWD Response to Intervenor 2#27 re: demand days.

On March 8, 2013, the Commission issued an Order denying JSEWD's Motion to Limit. In that Order, the Commission cited additional past Commission Orders in which aesthetics or real estate values were considered to some extent with respect to facility construction or siting issues. At the evidentiary hearing, JSEWD noted its continuing objection to consideration of such issues in a CPCN hearing for a water tank, and advised that it would raise any additional argument with respect to consideration of such issues, or the weight to be given to such issues, in its brief.

The Orders cited by the Commission were, with one exception, cell tower applications in the relative infancy of the cell phone industry. It should first be noted that there was considerable controversy as to whether the Commission should regulate such towers at all. Issues included widespread public opposition to such structures and whether such placements were planning and zoning issues that had nothing to do with the Commission. Of the cases cited in the Commission's March 8, 2013 Order, four were cases decided between 1991-1994 in which the Commission was grappling with how to address public complaints about siting for these new and (then) unusual structures, including complaints about potential health and safety concerns from such (then) unfamiliar structures.

A fifth case, also involving a cell tower, actually supports JSEWD's position in this case. Intervenors in that case "opposed the proposed construction because of the effect on property values and the aesthetic impact on the area. The Intervenors allege that more suitable alternative sites exist."<sup>69</sup> As the cited Order states:

In response to an Intervenor's request, BellSouth Mobility offered to paint the proposed tower "sky blue" and provide landscaping for

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<sup>69</sup> *Application of Kentucky CGSA*, Case No. 96-268, Order of Feb 6, 2007 at page 3.

additional buffering. BellSouth Mobility stated that an alternative site was investigated but was not available for lease. The Intervenor argued that more suitable sites could be found and remained concerned that the proposed construction would impact property values in the area. The Intervenor contend that a site within the LG&E right-of-way or on property near a prison located outside the search area would be more suitable. The Commission finds that the proposed construction is necessary and that the location selected by BellSouth Mobility is the most appropriate within the search area. BellSouth Mobility has offered to take reasonable actions to minimize the aesthetic impact of the proposed facility including painting the monopole and providing additional landscaping.<sup>70</sup>

As in the *CGSA* case, JSEWD has already advised that it will select a neutral sky color for the tank and has developed a landscaping plan for the site that is designated on the construction plans.<sup>71</sup> In addition, while the Intervenor have repeatedly criticized JSEWD for considering actual site availability to be an important consideration, the Commission in this Order accepted *CGSA*'s explanation that the one additional site that was investigated was "not available for lease". The Commission specifically found that the Company's actions were "reasonable actions to minimize the aesthetic impact of the proposed facility including painting the monopole and providing additional landscaping." To the extent that the considerations in *CGSA* have any relevance or weight in this proceeding, JSEWD has already taken the actions cited with approval by the Commission as reasonable to meet aesthetic and real estate value concerns.

Water tanks, unlike cell towers, have been part of the landscape for the past several hundred years and certainly since before any of the participants in this proceeding were born. It

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<sup>70</sup> *Id.*

<sup>71</sup> JSEWD Response to PSC1#19.

is significant that neither the Intervenor nor the Commission to date has cited any PSC Order in which aesthetics or real estate values have been discussed in any manner in a water tank CPCN case. JSEWD is not aware of any such Order. The absolute lack of any concern about such issues in previous Commission proceedings is persuasive in and of itself in establishing that the aesthetic and real estate values issues raised by the Intervenor in this proceeding should not be considered, or at least given minimal if any weight by the Commission on this proceeding. JSEWD has already taken the actions deemed necessary in the *CGSA* case to meet such concerns.

Following the “cell tower” Orders cited by the Commission, KRS 278.665 was enacted, and states as follows:

**278.650 Procedures for proposals to construct antenna towers in an area outside the jurisdiction of a planning commission -- Hearing -- Building permit fee.**

If an applicant proposes construction of an antenna tower for cellular telecommunications services or personal communications services which is to be located in an area outside the jurisdiction of a planning commission, the applicant shall apply to the Public Service Commission for a certificate of public convenience and necessity pursuant to KRS 278.020(1), 278.665, and this section. The commission shall convene a local public hearing on the application upon the receipt of a request from the local governing body or from not less than three (3) interested persons that reside in a county or municipal corporation in which the tower is proposed to be constructed. **In reviewing the application, the commission may take into account the character of the general area concerned and the likely effects of the installation on nearby land uses and values.** A local government may charge a fee for a building permit, in connection with the construction or alteration of any structure for cellular telecommunications services or personal communication services, if the fee does not exceed that charged for any other commercial structure of comparable cost of construction. (emphasis added)

**Effective:** April 23, 2002

This statute clearly recognizes that cell tower cases (like high voltage electric transmission line cases) are different from other CPCN cases. This statute, for instance, specifically provides that “[i]n reviewing the application the commission **may** take into account the character of the general area concerned and the **likely effects of the installation on nearby land uses and values [emphases added]**”. Unless this grant of authority is purely superfluous, the statute is in fact granting such authority (which the Commission presumably lacked absent the grant) to consider aesthetics and the effects of a proposed facility on land values – but only for cell tower CPCN cases.

The Commission commendably also cited an Order in which it came to an entirely different conclusion concerning its jurisdiction over aesthetics and real estate values issues. That case involved a complaint over burying (non-high voltage) electric lines. As the Commission stated therein, “[a]s noted in the complaint, the location of service lines at issue here involves questions of aesthetics and the economics and competitive nature of real estate sales, **matters that are beyond the jurisdiction of the Commission.**”<sup>72</sup> (emphasis added) In the only case cited by either the Intervenor or the Commission which does not involve the special cases of either high voltage electric transmission lines or cell towers, the Commission agreed that aesthetics and real estate values are beyond the Commission’s jurisdiction.<sup>73</sup>

JSEWD agrees with this conclusion. KRS 278.665 supports this conclusion, as do specific statutes for high voltage transmission line approval, including but not limited to KRS 278.027, which states in relevant part:

... the commission shall first determine that the proposed route of the line will reasonably minimize adverse impact on the scenic and

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<sup>72</sup> Case No 95-480, *Crisp/Cannon Development Co., Inc. v. Owen County Electric*, Order of March 11, 1996 at pp. 3-4.

<sup>73</sup> Subsequent to the cell tower decisions in the Commission’s Order, the legislature has enacted KRS 278.665, which specifically gives the Commission authority to consider impact on real estate values in a cell tower CPCN.

environmental assets of the general area concerned, consistent with engineering and other technical and economic factors appropriate for consideration in determining the route of the line. At the said public hearing provided for in KRS 278.020(1), all persons residing on or owning property affected by the proposed transmission facility may be heard.

**History:** Created 1974, Ky. Acts Ch. 388, sec. 2.

Such statutes specifically add aesthetics, environment concerns and real estate value concerns to the Commission's authority for those specified cases – but not for all CPCN cases. It is noteworthy that parties as diverse as Kentucky-American Water Company and the Attorney General agree that the PSC's authority in the area of aesthetics is limited. For instance, in its brief in Case No. 2007-00134, KAW included a section headed “**C. THE COMMISSION SHOULD NOT BE DISTRACTED BY ENVIRONMENTAL ISSUES [caps and bold in original]**”. In this section, KAW agreed with the then-PSC Chair that the PSC has “no authority whatsoever over environmental matters”. KAW continued: “That statement is accurate and perfectly consistent with the Commission's well-defined jurisdiction under state law that does not, in any way, authorize the Commission to address environmental, historical or cultural issues in ruling upon whether a proposed project will serve the public convenience and necessity.” This statement cites *Kentucky Utilities Co.*, 252 S.W. 2d at 890. KAW further states: “The Commission has not considered environmental issues in the past and should not do so now.”<sup>74</sup>

KAW's Brief further states that the PSC's powers are fully statutory; that KRS Chapter 278 does not delegate authority to the PSC to address environmental issues; and that the “public convenience and necessity” requirement in KRS 278.020 “has not been construed to include consideration of environmental issues.” KAW further cites other jurisdictions for the proposition that a similar statute “does not expressly or by implication require the commission to consider

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<sup>74</sup> KAW Brief, Case No. 2007- 00134 at pp. 46.



the environmental, recreational or **aesthetic** impacts of its findings and order [fn. omitted][**emphasis added**]. KAW concludes: “therefore, this is not the forum to address environmental or cultural resources issues, and the Commission should refrain from consideration of those issues.”<sup>75</sup>

The Attorney General was a party to Case No. 2007-00134, and stated as follows:

The Commission is not precluded from conducting an examination into the opposition to a project. Nonetheless, following a review of the statutes, case law, and Commission precedent, one point is manifest. The Commission's powers are purely statutory, and "it cannot decide issues not subject to its jurisdiction." 116 Thus, KRS 278.020 does not invest the Commission with authority to determine all issues relating to a project.<sup>117</sup> <sup>76</sup>

JSEWD respectfully recommends that the Commission reconsider its ruling in the March 8, 2013 Order, and hold that with the exception of safety-related issues, aesthetic and real estate values are not relevant considerations in CPCN cases except to the extent that the Commission’s authority has been extended by statute to such considerations.

As a matter of sound public policy, JSEWD respectfully recommends that in the event that the Commission determines that such issues are to be considered at all, they are to be given little or no weight in deciding whether a CPCN will be granted. This case illustrates numerous reasons why such issues generate significant heat and expense, but shed little light on the real issues involved in a CPCN case, including but not limited to:

- The evidence is overwhelming in this case that JSEWD has tried in good faith and on multiple occasions to meet aesthetic and real estate based siting concerns for ten years, but is still under attack for not reasonably considering alternatives.

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<sup>75</sup> KAW Brief, Case No. 2007-00134 at pp. 47-48.

<sup>76</sup> AG Brief, Case No. 2007-00134 at pg 29.

- Alternative sites may well draw the same opposition – in fact, the “Brown” site investigated as an alternative resulted in complaints from the Harrods Ridge neighborhood association.<sup>77</sup> Any other site might well bring a similar complaint, particularly if it is understood that such complaints can result in preferential treatment in siting for the neighborhood which complains the loudest.
- The record is clear that JSEWD considered numerous alternatives to the Switzer Site, both on its own initiative and as suggested by both the subdivision developer and the Intervenor.
- There is no evidence that the proposed water tank in any way poses a health or safety danger to the Forest Hills subdivision.
- There is no evidence of any impact whatsoever on the Forest Hills neighborhood, such as noise, noxious odors, or increased traffic other than that some residents will likely have a view of some portion of the proposed water tank.
- There is no physical encroachment whatsoever on the subdivision, other than an access easement that has been included on the plat for the subdivision long before any current owner purchased their property, and any purchaser has constructive notice of such an easement. JSEWD has acquired an access easement outside of the Forest Hills subdivision that will be used for construction traffic to the extent possible.
- No evidence of any kind has been presented to even suggest that the Switzer Site is technically deficient or unsuited in any engineering sense for its intended purpose.
- The Intervenor suggests that high-end subdivisions owned by relatively wealthy landowners should be given preferential treatment with respect to facility siting because

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<sup>77</sup>Testimony of William Bates; confirmed by testimony of Logan Davis.

of the alleged impact on the socio-economic status of the neighborhood, and because such landowners have options with respect to their place of residence. This claim would create significant policy concerns if adopted by the Commission. Such a policy, even if correct in its assumption that the presence of a water tank would have some impact on nearby property values (which JSEWD disputes), would favor siting all utility facilities in “lower-end” neighborhoods so as to avoid the alleged greater impact on “upscale” residential neighborhoods. Such a policy would be of doubtful legality, and is even more doubtful as sound public policy. The Commission should reject any siting principle that specifically favors one socio-economic group over another merely based on that group’s superior purchasing power and choice of residences. More “captive” customers of regulated monopolies should receive at least as much consideration as groups with more choices.

- The Intervenors suggest that JSEWD should solve their siting complaint by using eminent domain to acquire any available site, regardless of the opposition of that landowner or landowners. JSEWD does not rely on eminent domain unless necessary, and strongly objects to meeting one customer’s complaint by forcibly taking the property of another customer.
- Neither KRS 278 nor 807 KAR give any notice to a utility such as JSEWD that aesthetics, real estate values or “built environment” concerns such as viewsheds are issues in a water tank CPCN, let alone how evidence with respect to such issues will be evaluated or weighed. In the numerous Commission Orders issued in recent years on water tank CPCN’s, not one to JSEWD’s knowledge discusses any such issue with

respect to water tank siting for purposes of a CPCN, or how such issues might relate to a CPCN request for approval of a needed water tank.<sup>78</sup>

## **2. Specific Intervenor Complaints**

### **a. Reasonableness of JSEWD's Actions**

Intervenors William Bates and another resident of Forest Hills, Logan Davis, testified as to their concerns about a water tank being built at the Switzer Site, and as to their recollection of the negotiations that took place between them and JSEWD over possible alternatives to relocate the water tank site.

During their testimony, it became apparent that although the Intervenors in this case include the Forest Hills Residents' Association, Inc. and while all residents of Forest Hills are required to be members of the Residents' Association, not all members of the Residents' Association are in favor of this complaint. It is unknown how many residents endorse the positions stated by the Intervenors in this proceeding, and how many might actually oppose them. Therefore, in speaking of the Intervenors arguments, it should be recognized that such arguments may only represent the voices of a small minority of Forest Hills residents.<sup>79</sup>

While both Mr. Bates and Mr. Davis alleged that they were treated unreasonably by JSEWD, they presented no evidence of any improper motivation or conduct by JSEWD. They were permitted to present their views at a number of JSEWD board meetings. JSEWD considered all alternatives proposed to it by Mr. Bates and Mr. Davis as representatives of the unknown number of Forest Hills residents who actually may have been opposed to the Switzer

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<sup>78</sup> JSEWD's review of recent water district CPCN cases for water tanks does not reveal anything approaching the scrutiny of siting that has occurred in this case. As one example, see Case No. 2012-00354, Bullock Pen Water District, Order of September 13, 2012. This case involved a 500,000 gallon elevated water storage tank, in addition to other substantial projects including 1.17 miles of new eight-inch water mains.

<sup>79</sup> Of the 31 residences existing in March of 2011, it appears that no more than one-half voted in favor of taking legal action to resist placement of the tank on the Switzer Site – Intervenors' Response to JSEWD1#2(h).

Site, in addition to the alternative sites that JSEWD had already investigated prior to purchasing the Switzer Site and then again as part of the extensive discussions with the subdivision developer, Mr. Mangold.<sup>80</sup> JSEWD was always completely open with Mr. Bates and Mr. Davis. JSEWD always stated its position that other ratepayers should not be saddled with the costs of relocating the Switzer Site to meet the aesthetic concerns of a small number of Forest Hills residents. JSEWD postponed plans to move forward with this CPCN Application for over a year in an effort to meet the objections raised by Messers. Bates and Davis. JSEWD requested a postponement of the evidentiary hearing to further investigate alleged alternative sites proposed by the Intervenor. The record here demonstrates more than reasonable efforts by JSEWD to explore siting alternatives.

Mr. Bates testified that at least one alternative site that was explored drew a strong objection from another neighborhood association.<sup>81</sup> Further, Mr. Davis, who is a builder, revealed that when he purchased several lots from Mr. Mangold (the subdivision developer), and that he specifically asked Mr. Mangold about any uses of neighboring property that might affect the subdivision, and Mr. Mangold replied that there were none<sup>82</sup>. As noted above, Mr. Mangold was very aware of the intended use for the Switzer Site and had been advised repeatedly by JSEWD to reveal the intended use of the Switzer Site to potential buyers. While JSEWD was not privy to Mr. Davis' conversations with Mr. Mangold, Mr. Davis' testimony indicates that any complaint that he has about being misled about the use of the Switzer Site should be directed at the developer, not JSEWD.

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<sup>80</sup> Negotiations with Mr. Mangold actually progressed to the tendering of a proposed Agreement, which Mr. Mangold did not execute for unknown reasons. Exhibit2- JSEWD.

<sup>81</sup> Video Transcript of March 14, 2013 hearing at 11:03:47-11:04:10.

<sup>82</sup> Video Transcript of March 14, 2013 hearing at 11:26:41-11:27:40.

### **b. Toleman Testimony – Real Estate Values**

As part of its responses to JSEWD supplemental information requests, the Intervenor produced a response from Mr. E. Clark Toleman, a certified real estate appraiser.<sup>83</sup> As part of this statement,<sup>84</sup> Mr. Toleman made a number of allegations about his perception that Forest Hills would inevitably become a “lower value neighborhood” if the proposed water tank were built on the Switzer Site. Mr. Toleman’s response was long on opinion and short on fact (indeed, devoid of fact). For example:

- Prospective purchasers in Forest Hills will simply choose not to purchase such properties if the proposed tank is built. Evidence of this in Forest Hill or any other subdivision – none.
- “lenders will be resistant to loan money to purchase property in the subdivision if the water tank is constructed” – evidence of this in Forest Hills, any other subdivision, or any case whatsoever – none.
- Real estate values will decline as Forest Hills becomes a lower value subdivision – evidence of this in Forest Hills or any other subdivision - none.
- Extent of real estate value reduction – “it is difficult to determine” – no specific value given – support for any specific conclusion as to decline in real estate value – none.

In response to these claims, JSEWD retained William L. Berkley, Jr., a certified appraiser who opined as such, to investigate Mr. Toleman’s allegations and determine whether his claims could be substantiated by any actual experience or evidence. Mr. Berkley’s Report was filed by JSEWD on March 11, 2013, in accordance with the Commission’s Order of that date.<sup>85</sup> Mr. Berkley’s comprehensive study of actual market sales experience in a very similar neighborhood,

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<sup>83</sup> Although Mr. Toleman is a certified real estate appraiser, he admitted in his testimony that he was not opining as such (presumably because his opinion was based on outdated PVA values), but merely as a consultant. Video Transcript of March 14, 2013 hearing at 13:25:36-13:27:22.

<sup>84</sup> Intervenor’s Response to JSEWD2#3(a); as already noted above, Mr. Toleman further suggested that “upscale” neighborhoods should be given special consideration in water tank siting.

<sup>85</sup> Exhibit 14-JSEWD.

Harrods Ridge, which is located nearby across US 68 from Forest Hills , and with respect to a 500,000 gallon water tank located in the UK arboretum which is in very close proximity to an established residential neighborhood, demonstrated that there is no correlation between a view of a large water tank and a reduction of any amount in property values based on market transactions.

At the evidentiary hearing, Mr. Toleman, appearing as a consultant and not as a certified real estate appraiser, for the first time attempted to quantify his allegation of a reduction in real estate values in Forest Hills that would allegedly result from the proposed water tank. Mr. Toleman presented a result, but no supporting analysis. He did not prepare a report or additional written analysis. He did not explain the derivation of his proposed percentage reduction in property values, or present any rigorous empirical analysis that showed that any other such reduction had actually occurred in any other subdivision, whether “upscale” or of “lower value”. He did not present a single actual example of any lending institution refusing to loan money for a property transaction merely because of the presence of a water tank on nearby property.

JSEWD called William L. Berkley, Jr. in rebuttal. Mr. Berkley explained again that his extensive analysis of property sales transactions for properties with a view of a water tank or in close proximity to a water tank did not reveal any effect on property values as opposed to properties without such a view. Mr. Berkley emphasized the importance of using actual market sales transactions in such analyses, rather than relying on preconceptions or PVA data.<sup>86</sup> Mr. Berkley also demonstrated by factual analysis that there is no demonstrable impact on lot value from a view of a water tank, which is very significant because it removes the variable of structure condition, whether due to improvement or decline in the structure’s dimensions and condition.

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<sup>86</sup> Video Transcript of March 14, 2013 hearing at 15:17:51-15:20:59.

As the Intervenor agrees, there has been an event that caused a considerable impact on property values in Forest Hills, if not every subdivision in Kentucky. The impact of the pronounced recession in the housing market in the past few years has indeed resulted in a significant reduction in real estate values. In Forest Hills, for example, reported real estate transactions demonstrate a profound impact on property values as a result of the housing market recession. For example, a property at 631 Burr Oak Drive that transferred for \$971,000 on December 23, 2009, was purchased by its current owner for \$775,000 on April 9, 2010, a reduction of over 20% in market value in less than one year.

Mr. Toleman claimed that the mere presence of a water tank on a nearby property will cause a reduction in property values in the Forest Hills that is equal to or greater than the reductions that were caused by the greatest housing market depression in U.S. history, as well as the greatest overall economic downturn since the Great Depression. Yet Mr. Toleman presents neither actual evidence nor a rigorous empirical analysis to support this dramatic opinion. The Commission should give no weight to this unsupported opinion, particularly in light of Mr. Berkley's well reasoned and fully supported report and rigorous empirical analysis which completely debunks Mr. Toleman's claims, and in light of absolutely no precedent in Commission decisions that would support such an extreme claim in any previous Commission water tank decision.

### **c. Photo Science Report**

JSEWD has already expressed its objections to the use of the Photo Science Report in its Motion to Limit and supporting pleadings, and will not repeat those objections here, but incorporates its Motion and related pleadings herein by reference.



The Intervenors presented direct testimony by Michael Ritchie to support his findings in this report. The report is essentially a “viewshed” analysis, which attempts to locate “potential” sites for a water tank based on land elevation and proximity to water mains, while limiting the number of residences in the “built environment” that will have a view of a water tank if constructed on such a site. In his testimony, Mr. Ritchie claimed that his study was inaccurate because he studied elevations at or above 950 feet, while John Horne’s analysis pointed out that the proper site for the proposed water tank should be at least one thousand feet for proper operation and to avoid prohibitive costs for lengthening the legs of a tank.<sup>87</sup> Mr. Ritchie did not offer any correction to his study, and admitted on cross-examination that he was not aware that JSEWD had provided a supplemental response that corrected this misunderstanding on January 18, 2013, some two months prior to the actual evidentiary hearing of March 13-14, 2013.<sup>88</sup> The Intervenors offered no explanation as to why this information was not provided to Mr. Ritchie so as to offer a corrected analysis if needed at some point prior to the evidentiary hearing.

JSEWD’s project engineer, John Horne, conducted an extensive investigation of the alternative sites identified in the Photo Science report. His detailed findings are part of the record in this proceeding.<sup>89</sup> The Horne evaluation demonstrates that not only is the Switzer Site a reasonable site for the proposed water tank, it is the most appropriate site.<sup>90</sup> Notwithstanding Ritchie’s use of the wrong elevation, the Photo Science Report’s suggested sites were unsuitable for many other reasons. The relevance of the Photo Science report, if any, is that JSEWD again went out of its way to investigate every alternative site, and that any implication that JSEWD has

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<sup>87</sup> Exhibit 8-JSEWD.

<sup>88</sup> Video Transcript of March 14, 2013 hearing at 14:45:00-14:46:00.

<sup>89</sup> Exhibit 8-JSEWD.

<sup>90</sup> His findings are summarized in Exhibit 9-JSEWD.

not reasonably investigated alternative sites for the proposed tank is simply contrary to all of the evidence in this record.

In his direct testimony, Mr. Ritchie agreed that he had never visited any of the sites that he proposed, had never made any engineering or technical analysis of his proposed sites, and had no idea if the sites were available other than perhaps by the exercise of eminent domain. He did not offer any opinion that the Switzer Site was technically or from an engineering perspective insufficient for the proposed water tank. Mr. Ritchie admitted that Photo Science had never offered such an analysis for a water tank CPCN case before. He agreed that the process followed by John Horne in the initial analysis that led to the acquisition of the Switzer Site was similar to his approach to identifying possible sites. In sum, Mr. Ritchie did not present any evidence to support any alternative site as equal to, let alone superior to, the Switzer Site, other than perhaps in a purely aesthetic viewshed analysis from the point of view of some Forest Hills residents.

Mr. Ritchie was very forthcoming in stating that his report was more of a starting point for identifying potential sites than a recommendation that such sites are superior alternatives. As Mr. Ritchie made clear, the Photo Science siting approach is more of a process than advocacy for a particular result. Indeed, John Horne stated in his evaluation that he was not objecting to the use of the Photo Science approach as a tool in high voltage electric transmission line siting. However, JSEWD does object to the apparent attempt to use this process in a completely unprecedented way to at least strongly imply that JSEWD did not reasonably investigate alternative sites for this tower.

Mr. Ritchie testified at length as to the process used to develop a Kentucky-specific siting model for high voltage electric transmission lines. While Mr. Ritchie stated that everyone, including JSEWD, was invited to a conference to discuss the proper application of this

methodology, in fact the conference material clearly shows that the only topic was high voltage electric transmission line siting. The conference was sponsored by EON and East Kentucky Power Cooperative, two electric utilities. The topics were all related to high voltage electric transmission line siting. Water tank siting was not even a footnote in this process. Further, the entire process was devoted to routing and corridors, not any site specific facility. Mr. Ritchie made a somewhat convincing case that process is important in establishing such models. However, the record in this case reveals not a process, but an advocacy by the Intervenors of the use of an alleged modification of an approach without any process at all to review whether the model has any application outside of its original intended purpose. There has never been a study of, or even a conversation about, the applicability of this model to water tank siting, or indeed to any siting other than a route or corridor. Photo Science never sponsored a conference to receive input into whether this model has any validity in water tank siting. This application has never previously been presented for any purpose in a water tank siting case. Mr. Ritchie was retained in November of 2012 by the Intervenors, but neither he nor they ever requested a technical conference to receive input into the potential pitfalls of the approach that they intended to propose. Mr. Ritchie in particular never made any effort to contact JSEWD to discuss whether such a model had any applicability to this proceeding, or to water tank siting in general. Given Mr. Ritchie's concern for process, his lack of any process in this advocacy filing is puzzling and troubling. The result of this total lack of process in employing a "process" model is an error-riddled, meaningless exercise that did not provide any useful information, but resulted in significant undue complication and unnecessary expense.

The Photo Science Report should not be given any weight in the Commission's deliberations on this CPCN. It is filled with errors that could have been easily avoided had Photo

Science followed the process that it values so highly, not merely on the elevation question, but the misapplication of system maps and specifications. Mr. Home's approach in originally identifying potential sites was consistent with the approach suggested by Photo Science. The Photo Science report offers no actual technical or engineering evaluation of the alternative sites that it proposes. The report is merely another lengthy and expensive detour to getting to the actual issues in this Application.

**d. The Actions Taken by JSEWD With Respect to the Switzer Site are Appropriate and Reasonable, and Would Need to be Duplicated at Additional Cost at Any Alternative Site.**

The Intervenors argue or imply that some or all of the costs incurred by JSEWD with respect to the Switzer Site are unreasonable or should not have been incurred, and therefore should not be considered in determining the additional cost of relocating the site for the propose water tank.

The costs incurred by JSEWD are detailed at JSEWD's response to Intervenors1#23, as of December 4, 2012. JSEWD amended this Response in its Response to Intervenors2#11. In addition to amending the response, JSEWD responded to specific questions concerning selected costs incurred for the Switzer Site, and pointed out that the Commission has previously accepted similar actions as reasonable for other utilities. JSEWD believes that all of these costs were reasonably and responsibly incurred with respect to the Switzer Site, and that significant additional costs would be incurred if an alternative site were chosen or ordered. In JSEWD's view, should the tank be relocated to an alternative site for the Intervenors' private benefit, then the Intervenors should reimburse JSEWD for such additional costs, and any other result would be unreasonable to JSEWD or its ratepayers. The Intervenors disagree, taking the position that they should not be responsible for the costs that they would impose on JSEWD to meet their

siting preference. As the Switzer Site is the most appropriate site for the needed storage tank anyway, additional cost should not be an issue.

It is unclear to JSEWD what use of the Switzer Site would ever be acceptable to the Intervenor. They have already stated that even a smaller tank on the Switzer Site would be unacceptable to them. Apparently the Intervenor is of the opinion that only an undeveloped greenspace would be an acceptable use for the Switzer Site. JSEWD would be punished for responsible planning should the Intervenor prevail on their claim.

## **V. CONCLUSION**

This Application has been subjected to perhaps unprecedented scrutiny for an application by a water district for a CPCN for a water tank. After all of the sound and fury, the end result is that the proposed water tank is needed to assure adequate storage to meet the needs of the JSEWD system and its customers. The proposed tank is extremely cost efficient for JSEWD and its customers, especially considering that JSEWD has secured a \$1 million grant that will cover almost 50% of the construction costs. The tank will not result in wasteful duplication. JSEWD has adequately and reasonably considered both actual functional alternatives to the proposed storage tank and numerous alternative sites that it has identified and that have been suggested to it by both the subdivision developer and the residents who would prefer an alternative site. The proposed tank, the proposed tank site, and the proposed financing are all reasonable and should be approved by the Commission.

JSEWD understands that those Forest Hills residents who oppose this project would strongly prefer that the needed storage be built elsewhere. It also understands that other residents

of Forest Hills, and residents of at least one other subdivision (Harrods Ridge), do not share this view. In the end, not only is the proposed Switzer Site an appropriate site for the proposed water tank, John Horne's analysis demonstrates that it is the most appropriate site. JSEWD has fully demonstrated that the proposed facility is needed, that it is the least cost solution to JSEWD's current and future storage needs, and that it will not result in wasteful duplication. JSEWD therefore respectfully requests that the Commission approve its application for a CPCN for the proposed storage tank and site and approve the proposed financing for this project.

Respectfully Submitted,

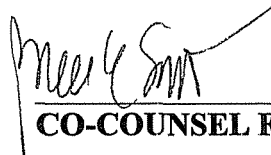
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bruce@smithlawoffice.net



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**CO-COUNSEL FOR WATER DISTRICT**

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Brief for Jessamine-South Elkhorn Water District was served by first class mail, postage prepaid, and by e-mail, this the 3rd day of April, 2013, to:

Robert M. Watt, III, Esq.  
Monica H. Braun, Esq.  
Stoll Keenon Ogden, PLLC  
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Lexington, KY 40507-1801  
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BRUCE E. SMITH

Water Usage Northwest Area  
 Jessamine-South Elkhorn Water District  
 August 2011 to July 2012

Month	Monthly Use Total (gallons)	Avg. Monthly Daily Use (gallons)	No. Days Use Exceeds 550,000 gallons	Maximum Day Use (gallons)	Minimum Day Use (gallons)
Aug -11	28,070,250	905,490	31	1,256,250	600,750
Sept - 11	21,536,550	717,885	26	1,229,625	487,500
Oct - 11	18,727,125	604,100	22	858,750	450,000
Nov - 11	15,238,800	507,960	7	1,261,125	338,625
Dec - 11	16,473,750	531,410	11	690,000	426,750
Jan - 12	17,254,050	556,580	20	606,000	476,625
Feb - 12	15,577,425	537,150	11	700,875	402,125
Mar - 12	15,700,725	506,475	5	618,000	450,000
Apr -12	17,035,575	567,850	15	883,500	305,250
May - 12	26,100,750	841,960	30	1,661,250	351,000
Jun - 12	33,467,700	1,115,590	29	1,693,125	540,700
Jul - 12	34,382,550	1,109,110	31	1,929,375	679,250
	<sup>(1)</sup> 259,565,250		238 <sup>(2)</sup>		

<sup>(1)</sup> Average Annual Daily Use = 709,2000 gallons (259,565,250 ÷ 366)

<sup>(2)</sup> Annual Percentage, Days Exceed 550,000 gallons = 65%

The current constructed storage in the District is 550,000 gallons. The average annual daily use is 709,200 gallons and the max/min average monthly daily use ranges from 1,115,590 gallons (Jun-12) to 506,475 gallons (Mar - 12). Ten of the past twelve months have monthly average daily use that exceeds the available 550,000 gallon storage. In July 2012, there were fourteen (14) days that demand exceeded 1.0 MGD and every day exceeded the available storage. However, to date the District has been able to maintain flows and pressure through judicious pumping and system management. But in order to meet 807 KAR 5:066, Section 4(4) will require the District to construct additional storage in order to safeguard the health and welfare of its present and future customers.



## FUNDING/CONSTRUCTION BUDGET

### CATNIP HILL PIKE 1.0 MG ELEVATED STORAGE TANK, PROJECT # 3569 Jessamine County, Kentucky

Jessamine-South Elkhorn Water District  
802 S. Main Street  
Nicholasville, KY 40356

#### CONSTRUCTION

<u>Project Cost Classification</u>	<u>Amount</u>
Administrative	\$10,000
Legal	\$5,000
<sup>(1)</sup> Land, Appraisals, Easements	\$0
Relocation Expense	\$0
Planning	\$30,000
Design Fee	\$131,600
Construction Engineering	\$25,000
Inspection Fee	\$80,910
Engineering Fees - Other	\$70,000
Construction	\$1,624,700
Equipment	\$0
Miscellaneous - Other	\$50,000
Contingencies	<u>\$164,790</u>
TOTAL PROJECT COST	\$2,192,000

<sup>(1)</sup> The tank site consisting of one (1) acre and access easement was purchased in 2004.

#### FUNDING

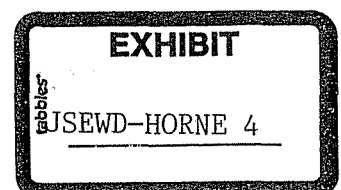
HB 608 Non Coal Grant (Grant ID# 229N-2008)	\$1,000,000
KRW - Bond Issue	<u>\$1,192,000</u>
TOTAL FUNDING	\$2,192,000

summary ranking based on matrix value with the most obvious winner being the proposed Switzer site.

	Site A	Site B	Site C	Site D	Site E	Site F	Site G	Site H
% in viewshed	0	65	62	83	75	60	100	56
Piping	165	4	0	90	78	8	3	6
Pipe upgrade	0	0	0	126	126	126	135	68
Access Road	102	0	0	116	128	7	0	0
Leg height	60	24	0	-168	-120	276	444	432
Others	15	15	0	15	15	15	15	15
Land	40	40	0	40	40	40	40	40
TOTAL	382	144	62	302	342	532	737	617

	Matrix Ranking	Cost Differential	Matrix Value
#1	Site C (Switzer)	-0-	62
#2	Site B (Brown)	\$82,850	144
#3	Site D (Strohl)	\$217,970	302
#4	Site E (McMillen)	\$266,570	342

EX. 8- JSEWD



**KENTUCKY-AMERICAN WATER COMPANY**  
**CASE NO. 2012-00096**  
***COMMISSION STAFF'S FIRST REQUEST FOR INFORMATION***

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**Witness:**     **Lance Williams**

27.     Provide the projected maximum daily demand for the Northern Division for each year from 2013 until 2032.

**Response:**

The projected maximum daily demands through 2025 are listed below. There are no projections beyond 2025.

2013 – 1.83 mgd  
2014 – 1.84 mgd  
2015 – 1.85 mgd  
2016 – 1.88 mgd  
2017 – 1.90 mgd  
2018 – 1.93 mgd  
2019 – 1.95 mgd  
2020 – 1.98 mgd  
2021 – 2.00 mgd  
2022 – 2.01 mgd  
2023 – 2.03 mgd  
2024 – 2.05 mgd  
2025 – 2.07 mgd

AGREEMENT

THIS AGREEMENT, made and entered into this 25<sup>TH</sup> day of FEBRUARY, 1986, by and between KENTUCKY-AMERICAN WATER COMPANY, a Kentucky corporation having its office at 2300 Richmond Road, Lexington, Kentucky (hereinafter sometimes called "COMPANY"). Party of the First Part, and LEXINGTON-SOUTH ELKHORN WATER DISTRICT, a Water District duly organized and existing under and by virtue of the laws of Kentucky, having an office at 200 W. Maple Street, Nicholasville, Kentucky 40356 (hereinafter sometimes called "DISTRICT"), Party of the Second Part;

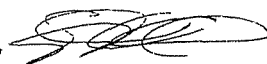
W I T N E S S E T H:

THAT, WHEREAS, the District has been formed for the purpose of supplying water for the inhabitants of District, and wishes to purchase, upon the terms and conditions hereinafter set forth, water in the quantities hereinafter mentioned from the Company for resale by District to its customers, and

WHEREAS, the Company is willing to sell water, in the quantities and upon the terms and conditions hereinafter stated, to District for resale by District to inhabitants of said District, and

WHEREAS, the parties entered into an Agreement on the 15th day of April, 1970, for the purchase and sale of water, and

WHEREAS, Company and District have mutually agreed to increase the amount of water to be supplied by the Company to the District,

PUBLIC SERVICE COMMISSION  
OF KENTUCKY  
EFFECTIVE  
4/12/2006  
PURSUANT TO 807 KAR 5:011  
SECTION 9 (1)  
By   
Executive Director

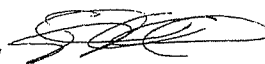
NOW, THEREFORE, in consideration of the mutual covenants of the parties hereto as hereinafter contained, it is hereby agreed by and between the parties hereto as follows, to-wit:

1. Company agrees to sell to District, and District agrees to purchase from Company at the rates hereinafter mentioned, such quantities of water as the District may hereafter from time to time require, not to exceed an average of Eight Hundred (800) gallons per minute, said water to be furnished at two connections to the water mains of the Company at:

(1) A point on the Harrodsburg Road Five Hundred (500) feet North of the Fayette-Jessamine County line. The amount to be supplied at this connection shall not exceed an average of Six Hundred (600) gallons per minute, and

(2) At a point on the Keene Road Five Hundred (500) feet North of the Fayette-Jessamine County line, in Fayette County, Kentucky. The amount to be supplied at this connection shall not exceed an average of Two Hundred (200) gallons per minute.

2. It is understood and agreed by the parties hereto that all of the limitations on consumption by District as set forth in paragraph 1 are of the essence, as well as the limitations contained in this paragraph. The per minute average limitations mentioned in paragraph 1 shall be computed using the entire consumption at each meter for a regular billing period of Kentucky-American Water Company for these purposes in the State of Kentucky one month, and dividing by the number of minutes in the billing period.

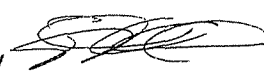
PUBLIC SERVICE COMMISSION  
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4/12/2006  
PURSUANT TO 807 KAR 5:011  
SECTION 9 (1)  
By   
Executive Director

period. In addition, the consumption at the meter near Harrodsburg Road, paragraph 1(1), shall never exceed 900 gallons for any one minute and the consumption at the meter near Keene Road, paragraph 1(2), shall never exceed 300 gallons for any one minute. In the event either or both of the consumption limitations contained herein are exceeded, then and in that event, Company shall have the right, in addition to such remedies as may be otherwise provided, to place such consumption restrictive devices in its system as will regulate District's demands within the limitations contained herein, both as to averages and per minute consumption.

3. It is understood by the parties hereto that District has constructed and is maintaining within said District a system of water works for the purpose of supplying inhabitants of the District with water for domestic, farm, public and manufacturing purposes and that District shall have its water distribution system connected with existing water mains of the Company at the delivery points referred to in Paragraph 1 above, each such connection to be a single meter connection. All such master meters, including vaults, shall be furnished, installed, operated, and maintained by the Company.

4. It is further understood and agreed by the parties hereto that Company shall not be required to provide uniform flows or maintain pressures to District and that District shall provide such elevated tanks or standpipes as may be necessary to provide adequate service to its customers, however, Company

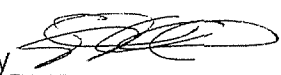
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OF KENTUCKY  
EFFECTIVE  
4/12/2006  
PURSUANT TO 807 KAR 5:011  
SECTION 9 (1)

By   
Executive Director

shall endeavor to maintain <sup>30 (Red)</sup>~~25~~ pounds per square inch of pressure at District's service connections under normal conditions.

5. It is understood and agreed that Company does not by this agreement undertake or contract that the service rendered through these connections shall include fire protection or sufficient quantities of water for fire extinguishment; and that District is fully aware that if it or its customers desire fire protection or sufficient quantities of water for fire extinguishment, that District must provide the same by the erection of elevated tanks, standpipes or ground storage with booster pumps for such service.

6. The obligation of Company to supply water hereunder is further limited by the understanding that Company shall undertake to use reasonable care and diligence in order to prevent and avoid interruptions and fluctuations in the supply of water, but that it cannot and does not guarantee or warrant that such interruptions and fluctuations will not occur, or that because of emergencies due to breaks, leaks, defects, construction or necessary repairs in its facilities, or caused by fires, strikes, acts of God, or other causes, there may not be periods during which the supply may be curtailed or interrupted. In event of such interruptions or fluctuations, no liability of any nature shall be imposed upon Company. Notwithstanding the foregoing, however, Company will not, in event of water shortages, discriminate against District and its customers by unreasonably curtailing service to District.

<p style="text-align: center;">PUBLIC SERVICE COMMISSION OF KENTUCKY EFFECTIVE 4/12/2006 PURSUANT TO 807 KAR 5:011 SECTION 9 (1)</p> <p>By  Executive Director</p>
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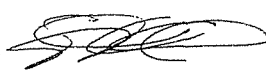
7. District agrees to pay to Company for water furnished under the terms of this agreement in accordance with the rates established by Company from time to time and approved by the Public Service Commission of Kentucky. All statements rendered by Company to District for water furnished under this agreement shall be paid at the offices of the Company within ten (10) days from date rendered. This agreement is specifically made subject to the Rules and Regulations of the Company as approved by the Public Service Commission of Kentucky, as the same now exist or may hereafter be amended. Company shall not increase its rates to District without obtaining approval of the Public Service Commission of Kentucky or instituting appropriate proceedings seeking approval of any revision in its rate schedule.

8. If at any time hereafter any statement for water furnished hereunder is not paid within ten (10) days from date rendered, Company shall have the right to discontinue service hereunder.

9. Unless terminated sooner as hereinabove set forth this contract shall be for a period of forty (40) years, with an option in District to renew the same thereafter for an additional term of thirty (30) years.

10. During the term of this Agreement, Company shall have the right of first refusal to purchase all of the assets of the District should District determine that it is for sale. Company shall be notified in writing of any bona fide offer that District may have and Company shall have ninety (90) days thereafter to meet any such offer.

PUBLIC SERVICE COMMISSION  
OF KENTUCKY  
EFFECTIVE  
4/12/2006  
PURSUANT TO 807 KAR 5:011  
SECTION 9 (1)

By   
Executive Director



11. In the event all or any part of the waterworks plant and facilities of the Company which are used in the furnishing of water hereunder are hereafter acquired by a municipal corporation or other governmental entity, then the Company shall be relieved of its obligations hereunder, and, in such event, this agreement shall be binding upon the municipality or governmental entity making such acquisition. This contract may be assigned by District to the United States of America, acting through the Farmers Home Administration, U.S. Department of Agriculture, or to the bondholders of said District, or to a receiver for their benefit in event of default of any payment of bond interest or principal, but any such assignment shall be subject to the terms and conditions herein stated.

IN WITNESS WHEREOF, the parties hereto have caused their corporate signatures to be affixed hereto by their duly authorized officers, all the day and year first above written.

KENTUCKY-AMERICAN WATER COMPANY

BY: *R. H. Edens*  
Vice President

LEXINGTON-SOUTH ELKHORN WATER DISTRICT

BY: *D. J. [Signature]*  
Commissioner

BY: *Ted V. [Signature]*  
Commissioner

BY: *J. W. [Signature]*  
Commissioner

BY: *[Signature]*  
Commissioner

BY: *[Signature]*  
Commissioner

<p>PUBLIC SERVICE COMMISSION          KENTUCKY          EFFECTIVE          4/12/2006          PURSUANT TO 807 KAR 5:011          SECTION 9 (1)</p> <p>By <u><i>[Signature]</i></u> Executive Director</p>
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