COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMMISSION

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**

JSEWD'S RESPONSE TO MOTION TO STRIKE

Comes the Jessamine-South Elkhorn Water District ("JSEWD") and in view of the time restraints imposed herein by the expiration date of the construction contractor's bid, reluctantly, but out of an abundance of caution, files its Response to the Intervenors' "Motion to Strike" ("Motion"), and states as follows.

1. Use of Motion to Strike

Per KY RCP 12.06, a motion to strike is appropriate to strike "from any pleading any insufficient defense or any sham, redundant, immaterial, impertinent or scandalous matter". Although the Commission is not bound by the technical rules of legal evidence, this rule should at least set the parameters for a Motion to Strike. First, JSEWD's brief is not a pleading as defined by KY RCP 7.01 in that it is not a complaint, an answer, a reply to a counterclaim, an answer to a cross-claim, or a third-party complaint or answer thereto. JSEWD's brief does not contain an "insufficient defense". It does not contain any "sham, redundant, immaterial, impertinent, or scandalous" matter. It merely references statements made by Kentucky-American

Water Company ("KAW") on matters that are material to the standards to be applied in this case.[1] Accordingly, Intervenors' Motion to Strike is wholly inappropriate.

2. PSC Approval to Argue Standards in the Brief

While the Intervenors now claim that JSEWD should not be permitted to argue about the standards to be applied to this Application in its brief unless it presented testimony about those standards, in fact JSEWD specifically requested a clarification from the Presiding Officer that such issues should be discussed in the briefs. The Presiding Officer correctly ruled that the brief was the place for such arguments.[2] JSEWD respectfully submits that this argument reasonably includes discussion, and evidence of, prior and completely inconsistent statements by common counsel for the Kentucky-American Water Company ("KAW") and the Intervenors on exactly the same issues and standards.

While the Intervenors appear to understand that briefs are not evidence in the case in which they are filed[3], they do not appear to understand that they are moving to strike, not evidence, but argument on the paramount issues in this case. They present no argument as to why reference to prior positions taken by their own counsel, as well as sworn responses proffered by their own counsel in a contemporaneous case on the very issue to be addressed in briefs, is improper. The make no claim that any reference is inaccurate. While they may be embarrassed by their effort to establish different criteria for review depending on whether the Applicant is

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[1] JSEWD's Brief does contain one very brief reference to a general position espoused by the Attorney General in a KAW case, which JSEWD submits is both *de minimus* and fairly referenced in the context in which they are presented. In addition, it is from a document has been in the Commission's records for some five-six years.

[2] Video Transcript, March 13, 2013, at 4:46:31-4:47:31.

[3] Motion to Strike at page 4; however, the brief filed by common counsel is the best evidence of the position taken by common counsel in Case No. 2012-00096 as opposed to the position that the same counsel is taking in JSEWD's application. JSEWD submits that these conflicting positions as to the standards to be followed in CPCN's for water tank siting that vary depending on the pecuniary or litigation interest of the differing clients, is highly relevant to understanding why the Intervenors' position with respect to imposing different standards on JSEWD than they have successfully argued for KAW is unreasonable and improper.

their client or not, that is not the basis for a Motion to Strike. The Intervenors were adamant that the parties have no duty to disclose their legal research to other parties prior to the brief, and the Commission did not grant a Motion by JSEWD for the parties and staff to reveal any cases of which they were aware upon which they intended to rely in their brief, despite JSEWD's offer to do so if other parties agreed.[4] While the specific topic of the motion was cases involving aesthetics issues, it was apparent that parties would not be required or even encouraged to reveal such cases, and that was a matter reserved for the parties' briefs. The section of JSEWD's brief reviewing the order in Case No. 2012-00096 and the arguments submitted by KAW to achieve that result[5], as well as references to other KAW cases, is the product of JSEWD's legal research and has been properly presented as part of JSEWD's brief pursuant to the Commission's rulings. The Intervenors now object to the procedure that they insisted upon, presumably because the result is not what they may have hoped. Such a result would be unreasonable under the circumstances herein and under the Kentucky Rules of Civil Procedure.

3. Common Counsel

The Intervenors and KAW share common law firm counsel in this proceeding and all references to the Order, KAW responses or briefs in Case No. 2012-00096 by JSEWD involve not only a law firm common to Case No. 2012-00096, but a common lawyer. In fact, that lawyer has filed this pleading. The Intervenors' Motion relates almost entirely to references to the record in Case No. 2012-00096. The term "common counsel" as used herein, unless otherwise specified, includes both a common law firm and a common individual or individuals.

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[4] Video Transcript March 13, 2013 at 9:07:00 – 9:07:54, and 9:10:45-9:11:25; also Video Transcript of March 14, 2013 at 10:22:26-10:24.
[5] JSEWD Brief, Section IV(A)(3).

4. Case No. 2012-00096 Order

The Commission's Order in Case No. 2012-00096 was issued on February 28, 2013. Any party to that case, including KAW, had until April 2, 2013 to seek judicial relief from that Order, including injunctive relief. No party did so, although as noted in JSEWD's brief, the Attorney General filed a Motion for Reconsideration that did not seek in any way to alter the result of the Order.[6] This expression of the Attorney General's position was not filed until March 19, 2013. KAW filed a subsequent Notice that it would proceed with construction on or after April 1, 2013, and to JSEWD's knowledge no party to that case has filed any objection or claim that the Order is either not in effect or that the findings therein are still subject to challenge. Neither the Attorney General's Motion nor KAW's Notice were in existence at the time of the evidentiary hearing on JSEWD's Application.

Both common counsel and the Commission obviously have had full knowledge of the entire record of Case No. 2012-00096 during the entire course of this proceeding. The Intervenors never sought to advise the Commission or JSEWD that their common counsel was concurrently arguing on behalf of their "other" client, KAW, positions and standards that were directly contradictory to the positions and standards that they were presenting on behalf of the Intervenors. Even after the February 28, 2013 Order was issued, the Intervenors did not advise anyone, to JSEWD's knowledge, that they had successfully (at least subject to appeal and injunction) convinced the Commission to accept their arguments on behalf of the expansive "KAW" standard. Even after common counsel had filed a Notice with the Commission that KAW intended to proceed under the February 28, 2013 Order, no such advice was, to JSEWD's knowledge, provided to anyone with respect to the continuing contrary standards being argued

[6] In their zeal to limit JSEWD's right to argue its case, the Intervenors even object to JSEWD's straightforward effort to state the procedural status of that case. See, Motion to Strike at pp. 1-2, Motion to Strike footnote 37 in JSEWD's brief.

by common counsel in this proceeding. JSEWD proceeded in accordance with the discussions at the hearing and the Commission's rulings to present its views on the standards to be applied in its brief, including the standards argued by common counsel and approved by the Commission in Case No. 2012-00096. The Intervenors were fully aware (more than JSEWD) of the inconsistent standards argued by common counsel in Case No. 2012-00096., but chose not to address Case No. 2012-00096 in their brief. Having waived their opportunity to discuss the relationship between that case and the standards to be applied in this case, they now seek to change the rules and cleanse the record of their positions in that concurrent case by striking all references to pleadings that common counsel filed in that case.

5. Motion Pursuant to 807 KAR 5:001, Section 11(4)

The Intervenors state that their Motion is pursuant to 807 KAR 5:001, Section 11(4). Pursuant to that section, the Commission will not receive as evidence any book, paper or document after the close of testimony in a case. The only "book, paper or document" attached to JSEWD's brief that is not already part of the record in this case is a one page document from Case No. 2012-00096 that sets forth projected maximum day demands for KAW's Northern Division. This document was prepared by KAW's Chief Engineer and was sponsored by common counsel. The Intervenors have not challenged the accuracy of this document. Indeed, they do not move to strike the document itself.

Unlike in cases cited by the Intervenors to support their Motion, the only actual document at issue in this Motion is not a document that was prepared after the conclusion of a proceeding to be offered as additional evidence of some claim. It is a pre-existing document that is already part of the Commission's records. It is also a document that was vouched for by the very

common counsel that is attempting to exclude it from the record in this case. 807 KAR 5:001, Section 11(5), for example, recognizes that existing Commission records can be incorporated by reference, and does not state that such incorporation must take place prior to the closing of testimony. Given that this document is already a part of the Commission's records, and was sponsored by the common counsel to begin with, it should not be treated as a document that should be excluded pursuant to 807 KAR 5:001, Section 11(4).

It should further be noted that the same response is cited in common counsel's Brief in that case.[7] Common counsel was thus vouching for this document, not merely proffering an information response signed by another.

The Intervenors cite four cases that they allege support the relief requested in this Motion. Upon closer review, those cases do not support their Motion to Strike. Indeed, they demonstrate why the Motion to Strike must be denied.

a. KU v. Henderson Union RECC, Case No. 89-349

The first case cited[8] involved a letter from a witness that was created twelve days after the evidentiary hearing, and was then tendered as additional evidence. One of the parties objected on the entirely sensible ground that they had no prior knowledge of the contents of this document until it was presented, and as it was newly created, they had been unable to examine or cross-examine that witness on the new created document. The Commission struck this newly created document from the record as the objecting party had not had an opportunity "to confront and cross-examine hostile witnesses".

[7] KAW's Brief, Case No. 2012-00096, page 12; citation in n.37.
[8] Case No. 89-349, In the Matter of: Kentucky Utilities Company v. Henderson-Union Rural Electric Cooperative Corporation (Ky. PSC May 21, 1990).

That cited case would fall squarely within current 807 KAW 5:001, Section 11(4). It involves a document created long after the close of evidence, and proffered as evidence. JSEWD has not proferred any document created after the close of the evidentiary hearing. JSEWD has only filed a brief. The only document attached to JSEWD's brief that was not already part of the record in this case was a document that was sponsored by the common counsel on behalf of their other client, KAW, in a concurrent case involving exactly the same issues before the same forum. The Intervenors not only had the opportunity to review this document, their counsel had sponsored the document. Counsel's claim to be denied due process because they have not had the opportunity to confront their own witness on a document that they vouched for in Case No. 2012-00096 is the height of absurdity. The Intervenors' Motion does not involve due process. Unlike the document in this cited case, the document here was sponsored by the party that is objecting to its use, is already part of the Commission's records, and no claim has been made that it is inaccurate or unreliable for the information contained therein.

The Intervenors like this case so much, they cite it twice. However, all it does is illustrate the proper application of 807 KAR 5:001, Section 11(4), as opposed to the Intervenors' effort to strike argument as to the proper interpretation of a recently decided case and various documents that are already part of the Commission's official records.

b. KU Fuel Procurement Practices, Case No. 9631

The second cited case[9] again involved, not a brief, but an effort to file a newly created document as evidence. The Commission determined, as in Case No. 9631, that it was not appropriate to reopen the record to accept this newly created document. JSEWD does not argue

[9] Case No. 9631, In the Matter of: An Investigation into the Fuel Procurement Practices of Kentucky Utilities Company (Ky. PSC August 17, 1989).

with this ruling, except to point out that it has as little to do with the Intervenors' Motion (or possibly even less) than does Case No. 9631. It involves a newly created document, offered as evidence that was not known to the objecting party let alone sponsored by counsel, and was not part of the Commission's records. It does not involve a reference to a pre-existing docket that has already been accepted as part of the Commission's records. Once again, the Intervenors' claim that they are prejudiced by not being able to cross-examine their own witness on testimony that they sponsored by that witness. Without intending to be facetious, it is difficult to imagine how Intervenors' counsel would confront themselves and the witnesses that they sponsored on behalf of their "other" client, KAW. Would they claim that they sponsored testimony, responses and argument that was false, misleading, or inaccurate?

c. Frankfort EPB, Case No. 2008-00250

The third cited case[10] involves an application for rehearing, not a brief. In addition to all of the objections stated above, JSEWD notes that such Applications are filed pursuant to KRS 278.400. Specific standards are set forth for such Applications in that statute. Those standards are of course completely inapplicable to this Motion, but the Intervenors cite it nonetheless. It is interesting, however, that the Intervenors' "capsule summary" of that case does not mention the crucial fact that that case involved KRS 278.400, not a brief or a pre-judgment issue.

[10] Case No. 2008-00250, In the Matter of: Proposed Adjustment of the Wholesale Water Service Rates of Frankfort Electric and Water Plant Board (Ky. PSC April 27, 2009

d. KU Fuel Adjustment Clause, Case No. 94-461-A

The fourth cited case[11] is novel in that at least it does involve a motion to strike portions of a brief. In this case, the Commission had identified briefing issues in an Order. The filed brief addressed issues that were not identified for briefing in that Order, nor were they issues that were raised previously in that proceeding. KU moved to strike the entire brief. This relief was denied, but the Commission did strike those portions that were specifically outside of the issues to be briefed that were established by Commission Order.

In the current case, and as noted above, the issue of the standards to be applied to water storage tanks was not only authorized by the Commission, but was also specifically determined to be a proper issue to be argued in the parties' briefs. The cited case not only does not support the Intervenors' Motion, it establishes that striking even a portion of a brief requires a determination that the issues being discussed in the brief are outside the scope of the proceeding. The issues being discussed in JSEWD's Brief, and that the Intervenors are challenging, are the **paramount issues** to be determined by the Commission per its own Order. In attempting to limit JSEWD's argument on the **paramount issues** to be decided in this case, the Intervenors are not protecting due process, they are attempting to deny JSEWD the fundamental right to fully address in argument the paramount issues in this case. The arguments presented by JSEWD are clearly material, relevant, and neither scandalous nor impertinent.

[11] Case No. 94-461-A, In the Matter of: An Examination by the Public Service Commission of the Application of the Fuel Adjustment Clause of Kentucky Utilities Company from November 1, 1994 to April 30, 1995 (Ky. PSC March 3, 1997).

While the Intervenors appear to understand that briefs are not evidence in the case in which they are filed[12], they do not appear to understand that they are moving to strike, not evidence, but argument on the paramount issues in this case.

6. Claim of Due Process Denial

The Intervenors claim that they will be denied due process if common counsel cannot confront themselves as to the claims made on behalf of their client in Case No. 2012-0096. This claim is simply absurd. If the common counsel now wants to state that the claims that were made on behalf of KAW in the cited cases were false, JSEWD will reconsider its position.

Any claim to "surprise" or being "sandbagged" by the common counsel is totally lacking in merit. Both the Intervenors and the Commission have already reviewed this document in Case No. 2012-00096, and it was part of the record that convinced the Commission to approve KAW's Application for new storage capacity in that case. Unless the common counsel intends to disavow this response, there is nothing to "confront" – this is testimony in an Application by their client for 900,000 gallons of new storage capacity under KRS 278.020(1), which was being considered concurrently with JSEWD's application. The Commission has only very recently accepted this and other claims by common counsel on behalf of their "other" client, KAW.

The standards used to approve KAW's Application are quite relevant to JSEWD's Application, as are the arguments and support advanced by common counsel in setting those standards. There is indeed a lack of due process issue here if the Intervenors are successful in

[12] Motion to Strike at page 4; however, the brief filed by common counsel is the best evidence of the position taken by common counsel in Case No. 2012-00096 as opposed to the position that the same counsel is taking in JSWED's application. JSEWD submits that these conflicting positions as to the standards to be followed in CPCN's for water tank siting that vary depending on the pecuniary or litigation interest of the differing clients, is highly relevant to under stand why the Intervenors' position with respect to imposing different standards on JSEWD than they have successfully argued for KAW is unreasonable and improper.

cleansing the record in this proceeding of the arguments advanced by their counsel to support standards and criteria that said counsel now repudiate when applied to JSEWD. JSEWD is entitled to have their Application judged under the same standards as those applied to KAW in its almost identical application.[13] The Intervenors waived the right to discuss their contrary position as to standards in their brief. Now that their common counsel is obviously advocating contrary positions as to those standards, it is too late to either concoct an explanation or remove all traces of such contrary positions from the record in this case.

It is interesting that the Intervenors' common counsel now apparently claims that the evidence and argument that it presented in Case No. 2012-00096 are "adverse" to the Intervenors interests. To the extent that the positions successfully advocated by common counsel on behalf of their "other" client, KAW, clearly contradict the standards proposed by common counsel to be applied to JSEWD, they are adverse.[14] They are adverse because the common counsel is now arguing for standards and a result that is completely incompatible with what they successfully argued in Case No. 2012-00096. The record in this case certainly should not be cleansed of the compelling evidence of this course of conduct. This conflict has been created by common counsel. They should not now profit from the conflict that they have created.

The Intervenors have failed to advise the Commission or JSEWD that they intended to argue for a completely different set of standards and an incompatible result to that the common counsel sought in Case No. 2012-00096. Instead, the Intervenors have simply argued a completely incompatible set of standards in this case, apparently in the hope that no one would notice. Such a course of conduct should not be rewarded by the Commission, nor should JSEWD

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[13] KAW was approved for 900,000 on new storage capacity; JSEWD seeks 1,000,000 gallons of new capacity.

[14] "The situation brings to mind Bizarro World in the Superman comics in which everything is the opposite of the way it should be. *See, also, "The Bizarro Jerry," "Seinfeld," October 3, 1996."* Intervenors' counsel, Robert M. Watt, III, Complainants' Response to Motion to Dismiss, Pg. 2 – n.1, Case No. 2011-00138.

be restricted in demonstrating that course of conduct through reference to already existing Commission documents filed and vouched for by common counsel. This is particularly important since the positions that the Intervenors are trying to strike go to the heart of this case, the "paramount issues", not the Intervenors' numerous side issues that have also consumed so much time, effort and expense on behalf of JSEWD.

7. Claim of Hearsay

Intervenors claim that the evidence and arguments that they put forth in Case No. 2012-00096 are inadmissible hearsay. See Paragraph 4, above. KAW's claims were presented or made by its common counsel with the Intervenors. They are not hearsay; they are admissions and statements against the interests of the Intervenors.[15] It is most odd that common counsel would try to exclude its own admissions as hearsay.

8. Materiality

The cited material is clearly material to the current case. The issues and case type are the same – the proper standards to be applied in considering a CPCN for proposed water storage capacity of approximately one million gallons. The cited statements are either those contained in the Commission's Order, or the arguments and support therefore presented by Common Counsel to achieve approval of KAW's very similar request for approval of new storage capacity. The cited material is very material to the issues under consideration by the Commission.

[15] While briefs are not evidence, prior inconsistent statements are fair ground for argument and reference.

9. Other References

JSEWD did indeed make numerous references to filings, brief arguments, and Order findings by the Commission on Case No. 2012-00096. All of the references are material, highly relevant, and demonstrate conclusively that when common counsel are representing KAW in an almost exactly similar Application, they are in complete agreement with JSEWD as to how the issues of need and capacity should be determined. Having successfully argued one set of standards for their "other" client, KAW, the Intervenors' counsel should not be permitted to argue the opposite to create a wholly different standard for JSEWD.

10. Allegation of Failure to Raise Issues

The Intervenors allege that JSEWD failed to raise one or more issues prior to the close of the evidentiary hearing. One example that they state is "redundancy". This was specifically raised by John Horne in his testimony.[16] The Intervenors chose not to question him on this issue. JSEWD has no explanation as to why the Intervenors appear to be unfamiliar with the evidence in the record.

11. Specific Claims - Validity

JSEWD submits that the discussion of Case No. 2012-00096 in Section IV(A)(3) of its brief is fully material, relevant and properly included in the record of this proceeding. The Intervenors are willing to admit (at least so far) that JSEWD is permitted to cite to prior Commission Orders. Included in the Commission Order of February 28, 2013 in that case is at least (but not limited to) the following:

[16]See, for instance, Video Transcript of March 13, 2013, at 12:41:00-12:42:15.

a. KAW total capacity for the Northern Division, including both current and proposed capacity (two elevated tanks with 600,000 and 300,000 gallon capacities)[17];

b. A discussion of KAW's position with respect to the need for redundancy, including for storage facilities[18];

c. KAW's position with respect to not contacting others for options that is not feasible[19];

d. Owenton's average daily production, and purchased water sales[20];

e. The ordering Paragraphs that accept KAW's arguments and approve KAW's Application for a CPCN that includes these two water storage tanks.

It is unclear to JSEWD if the Intervenors now argue that the evidence and argument that was presented by their common counsel in that proceeding is flawed, unreliable, and apparently untested, while ignoring the fact that every filing in that case was presented by their common counsel. Every document submitted in that case by KAW was approved by the Intervenors' common counsel. The Commission's decision in that case relied on the information presented by their common counsel. KAW has not, to JSEWD's knowledge, disavowed any of the evidence, discovery responses or argument that it provided in that case. The Intervenors, or certainly their counsel, were made aware of the potential conflict presented by this common representation very early in this proceeding, and chose to proceed anyway. That is not JSEWD's fault or responsibility.

[17] Order of February 28, 2013, Case No. 2012-00096 at pg. 9.
[18] *Ibid* at pg. 14.
[19] *Ibid* at pg 15, n.53.
[20] *Ibid,* at page 4 (including nn.15-17).

12. The KAW "Alternative"

With respect to the KAW "alternative" that the Intervenors tried to offer, JSEWD quite properly pointed out in its brief that there is no evidence in this record to support a claim that KAW has excess capacity to offer, and that there is no evidence that KAW has reserved any excess capacity for JSEWD's use. Quite the opposite is true, as specifically stated in KAW's response (filed by common counsel") that its proposes storage in Case No. 2012-00096 was only for KAW's needs. The Intervenors find this statement objectionable, presumably because it is their common counsel who made that claim, but common counsel made the claim that some excess capacity might be available to serve JSEWD, and now object to their own clear evidence that KAW does not plan storage capacity with reserves for other utilities. Then, as now, there was and is no evidence of any excess capacity as fantasized in the Intervenors' argument. JSEWD agrees with the Intervenors that common counsel's statements and evidence in Case No. 2012-00096 improve JSEWD's argument in this area, and properly so.

JSEWD also objects to attempts, as here and in the "redundancy" claim, to use this "Motion" as a supplemental brief, given the Commission's clear Order that reply briefs would not be permitted. JSEWD takes exception to numerous inaccurate statements and claims in the Intervenors' brief, but the Commission has already ruled that such replies are not permitted.

CONCLUSION

JSEWD's brief in its entirety (even without the questioned items) demonstrates conclusively that its proposed facility is needed, highly cost efficient, and not wastefully duplicative. One section of that brief quite properly refers to the Commission's most recently

decided case in which common counsel successfully argued for standards for their other client, KAW, that if also applied to JSEWD's application, would fully support such Application.

The fact that the Intervenors' case on the paramount issues is very seriously shaken by common counsel's actions in Case No. 2012-00096 is not a proper basis for a Motion to Strike. The Intervenors chose not to reveal or discuss the standards that the common counsel successfully recommended in Case No. 2012-00096, and have waived any further right to rationalize as to why different standards should now apply to JSEWD.

It is odd that the Intervenors would seek to strike from the record what the Commission already knows from the substantial record in Case No. 2012-00096 that it has only recently reviewed. In any event, this Motion is neither proper nor supported, and must be denied. JSEWD respectfully requests that the Commission deny this Motion and proceed with all due dispatch to approve this Application, so as to allow JSEWD to continue to provide adequate service to its customers. As noted in the record, such a decision by April 23, 2013, will enable JSEWD to avoid further additional expense in completing this project, and JSEWD respectfully requests that the Commission avoid any more Intervenors' detours and expeditiously approve this needed project.

Respectfully Submitted,

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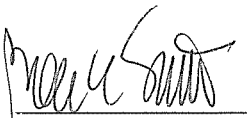

CO-COUNSEL FOR WATER DISTRICT

CERTIFICATE OF SERVICE

I hereby certify that the foregoing JSEWD'S Response to Motion to Strike was served by first class mail, postage prepaid, and by e-mail, this the 8th day of April, 2013, to:

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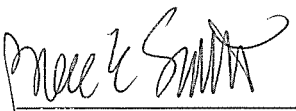

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