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MAY 30 2013

PUBLIC SERVICE
COMMISSION

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May 30, 2013

HAND DELIVERED

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

Re: Case No. 2012-00470

Dear Mr. Derouen:

Please find enclosed for filing an original and ten copies of the Response of the Intervenor to the Motion for Rehearing, etc. of Jessamine-South Elkhorn Water District in the above-captioned case. Please place this document in the file of the case and bring it to the attention of the Commission. Thank you in advance for your assistance.

Sincerely,

Robert M. Watt, III

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

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MAY 30 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) CASE NO. 2012-00470
CONSTRUCT AND FINANCE A)
WATERWORKS IMPROVEMENT)
PROJECT PURSUANT TO KRS 278.020)
AND 278.300)

**FOREST HILLS RESIDENTS' ASSOCIATION, INC.'S AND WILLIAM BATES'
RESPONSE TO JESSAMINE-SOUTH ELKHORN WATER DISTRICT'S
APPLICATION AND PETITION FOR REHEARING INCLUDING APPLICATION
AND PETITION FOR DECLARATORY ORDERS AND MOTIONS TO STAY AND
FOR A PROCEDURAL CONFERENCE**

Intervenors, Forest Hills Residents' Association, Inc. and William Bates, respectfully submit this response to Jessamine-South Elkhorn Water District's ("Water District") Application and Petition for Rehearing Including Application and Petition for Declaratory Orders and Motions to Stay and for a Procedural Conference. For the reasons set forth below, the Applications, Petitions and Motions of the Water District should be denied.

Declaratory Orders

The Water District has requested the Commission to issue "declaratory orders . . . that will clarify the standards to be applied in determining the reasonable capacity of a proposed water storage tank . . ." ¹ pursuant to 807 KAR 5:001, Section 18. The regulation section is a new addition to the Commission's regulations. It would seem that the section is designed to permit persons to seek declaratory orders in much the same fashion as declaratory judgments are

¹ Jessamine-South Elkhorn Water District's Application and Petition for Rehearing Including Application and Petition for Declaratory Orders and Motions to Stay and for a Procedural Conference ("Motion") at 4.

available in court proceedings. The Water District, however, has requested what amounts to advisory opinions of the Commission as to how it might win its case. Just as courts refuse to issue advisory opinions,² the Commission should likewise refuse to issue the advisory opinions requested by the Water District.

Moreover, the request for declaratory orders is made as part of a motion for rehearing filed pursuant to KRS 278.400. Again, it is not likely that the Commission intended the new regulation section to permit parties to Commission proceedings to request rehearing so they may obtain advice from the Commission as to how they should have tried their case.

The Water District requests standards to be utilized in determining the need for and size of water storage tanks. What follows, however, is a re-argument of its position that the standards for sufficiency of supply should be utilized to determine adequate storage capacity. No new evidence is offered in support of its argument. The Commission specifically found that storage capacity should be based on average daily consumption using an annual period.³ The Water District is free to argue that other metrics are relevant, but the Commission should not be asked prospectively which metrics it considers relevant.

The Water District then seeks a declaration that approved grant funds should be considered in determining whether a project is an “economically efficient investment.” Evidence regarding the grant funds was before the Commission when it issued the Merits Order and was undoubtedly considered by the Commission because the grant is specifically identified on page 3 of the Merits Order. The availability of grant funds does not transform an unnecessary water tank into a needed water tank. Indeed, Kentucky taxpayers should not be asked to pay for an

² Commonwealth v. Maricle, 15 S.W.3d 376, 380-381 (Ky. 2000) (Advisory opinions are beyond the constitutional powers of the court.).

³ Order dated April 30, 2013, herein on the merits (“Merits Order”) at 10.

unnecessary water tank with grant funds any more than the Water District's rates should be inflated to pay for an unnecessary water tank.

The Water District then asks the Commission to tell it what kind of demographic and demand capacity analysis it should have done. Again, it is not the job of the Commission to tell parties what they should have done to win their cases. The Commission explicitly addressed the inadequacy of the Water District's growth projections at page 11 of the Merits Order. The Water District is on notice that, in future cases, it must perform a better analysis than it presented in this proceeding.

The Water District then asks for a declaration that the Commission is prohibited from ordering it to enter into a contract for storage with Kentucky-American Water Company ("KAW") as a precondition for approval of a new storage facility. The Commission has never suggested that the Water District enter into a contract with KAW. It did, however, note that the Intervenor argued the Water District should have considered a storage arrangement with KAW. The Intervenor still believe that the Water District should consider KAW as an alternative source of storage if it will help the Water District comply with 807 KAR 5:066, Section 4(4).

The Water District moves the Commission to incorporate by reference the entire records of seven cases involving KAW into the record of this case. Intervenor oppose such motion because the record is closed in this case and the evidence in those cases is not relevant to this case. The primary thrust of this effort is to place evidence from Case No. 2012-00096⁴ into the record of this case. This is inappropriate because the Commission has noted that "[e]ach case must stand on its own facts."⁵ The Commission has already specifically stricken such evidence

⁴ *In the Matter Of: Application of Kentucky-American Water Company for a Certificate of Public Convenience and Necessity Authorizing Construction of the Northern Division Connection*, Case No. 2012-00096.

⁵ Case No 95-019, *In the Matter of: Richmond-Madison County Industrial Corporation, and the City of Richmond v. Kentucky Utilities Company, Blue Grass Rural Electric Cooperative* (Ky. PSC March 24, 1995).

from the post-hearing brief of the Water District in this case.⁶ The records of the seven cases should not be incorporated by reference in this case for the reasons cited in the Strike Order.

Rehearing of the Merits Order

The Water District's motion for rehearing of the Merits Order is nothing more than a rehash of its post-hearing brief, with specific emphasis on the evidence from Case No. 2012-0096 that was stricken from its post-hearing brief. It neither offers nor suggests that it can offer any new evidence that was not available at the time of the hearing. As such, the motion should be denied. In addition, the storage standard arguments based on Case No. 2012-00096 should be rejected out of hand.

The Water District mischaracterizes Case No. 2012-00096 throughout its Motion by claiming that the KAW proceeding and this case involve "very similar storage proposals."⁷ The very *name* of the KAW proceeding, which sought a certificate of public convenience and necessity to authorize the construction of the *Northern Division Connection*, belies the Water District's claim. As evident from the Commission's final order in Case No. 2012-00096, the principal issue in that proceeding was whether KAW would be permitted to remove the Owenton water treatment plant from service and connect its Northern Division to the Kentucky River Station II water treatment plant.

Ancillary to the proposed connection in Case No. 2012-00096 were the construction of water storage tanks. As the Commission's order notes, KAW was unable to remove one of its two elevated water storage tanks from service for repair without a significant degradation in system pressure.⁸ The Water District admitted during the hearing that it has no system pressure

⁶ Order dated April 30, 2013, herein regarding Motion to Strike ("Strike Order").

⁷ Motion at 4.

⁸ See the Commission's Final Order in Case No. 2012-00096 at 8.

concerns.⁹ As the Commission's order also notes, KAW plans to decommission one of its existing storage tanks, further demonstrating that the Water District's characterization of the amount of KAW's additional storage as a result of Case No. 2012-00096 is incorrect. The Water District has no plans to decommission any of its existing storage tanks, despite the fact that one of its tanks would sit empty most of the time if its certificate had been approved.

The claim that the Commission's final orders in this case and Case No. 2012-00096 are inconsistent because the final order in Case No. 2012-00096 did not address water tanks to the degree that the Merit Order in this case did is inaccurate and misplaced. Simply put, the water storage tanks KAW proposed were not a contested issue in that proceeding and were subsidiary to the Northern Division Connection. In contrast, this case involves the proposed construction of a one million gallon elevated water storage tank and nothing else, which was contested by the Intervenor throughout the proceeding because, among other deficiencies, the tank is not needed.

The Water District's argument that the one million gallon tank is neither wasteful nor excessive is simply a restatement of arguments previously made in this case. Likewise, the argument that current demands and growth projections support the one million gallon tank is a re-argument. This is best illustrated by the following statement on page 18 of the Motion: "Projections are subject to the same vagary of events that have occurred between 2006 and 2013, and will add little to the informed and credible judgments formed by Mr. John G. Horne in this proceeding."¹⁰ Rather than offer new evidence relating to customer growth, the Water District has chosen to insist that Mr. Horne's "informed and credible judgments" based only on his experience are better than the fact-based demand projections the Commission requires.

⁹ 3/14/13 Hearing Transcript at 9:59:00-9:59:26; 3/14/13 Hearing Transcript at 10:00:10-10:00-28.

¹⁰ Motion at 18.

Rehearing of the Strike Order

The Water District has also requested rehearing of the Strike Order. Again, no new evidence is offered or identified.

Rehearing Standard

The Commission has issued many orders over the years denying motions for rehearing pursuant to KRS 278.400 when the movant has, like the Water District, failed to proffer new evidence. A sample of such orders include:

- Case No. 2008-00499, *In the Matter of: Application of Atmos Energy Corporation to Extend Its Demand-Side Management Program and Cost Recovery Mechanism* (Ky. PSC Oct. 12, 2009) (KRS 278.400 “is intended to provide closure to Commission proceedings by limiting rehearing to new evidence not readily discoverable at the time of the original hearing. The Commission has carefully reviewed the AG’s motion and Atmos’s response thereto and finds that the AG offers no arguments or evidence not previously considered by this Commission. Accordingly, pursuant to KRS 278.400, rehearing is denied.”).
- Case No. 2008-00135, *In the Matter of: Complaint of Sprint Communications Company LP Against Brandenburg Telephone Company and Request for Expedited Relief* (Ky. PSC Dec. 15, 2009) (“Here, Brandenburg has not offered any new evidence or even hinted at what evidence may exist that it could introduce that would persuade the Commission to reverse its previous determinations. Additionally, Brandenburg does not advance any new arguments; it merely presents the same arguments that were presented throughout this proceeding and that the Commission dismissed in its November 6, 2009 Order. Because there is no new evidence and Brandenburg presents merely a rehash of its old arguments, we are unconvinced that we should revisit our previous Order in this case.”).
- Case No. 92-035, *In the Matter of: First Kentucky Cellular Corporation, a Delaware Corporation d/b/a Cellular Telephone Company of Kentucky, for the Issuance of a Certificate of Public Convenience and Necessity for the Operation and Construction of a Tower at the Location of the MTSO* (Ky. PSC May 11, 1993) (“The Commission has reviewed the evidence presented by First Kentucky on rehearing and finds that it has failed to offer any additional evidence which clearly and satisfactorily supports the necessity of the proposed tower’s construction either for financial or technical reasons. The Commission further finds that First Kentucky has failed to provide additional evidence upon rehearing which would change the Commission’s previous finding that there are significant safety concerns associated with this site. These concerns include the close proximity of the proposed MTSO cell site to...inhabited dwellings.”).
- Case No. 97-042, *In the Matter of: Petition of ICG Telecom Group, Inc. for Arbitration of Its Interconnection Agreement with Cincinnati Bell Telephone Company Pursuant to*

Section 252(B) of the Telecommunications Act of 1996 (Ky. PSC June 26, 1997) (“Neither party states that additional evidence is available. Nor does either party produce any arguments not previously considered by the Commission in its original decision. KRS 278.400 dictates that these motions be denied.”).

- Case No. 2007-00004, *In the Matter of: Brandenburg Telephone Company; Duo County Telephone Cooperative Corporation, Inc.; Highland Telephone Cooperative, Inc.; Mountain Rural Telephone Cooperative Corporation, Inc.; North Central Telephone Cooperative Corporation; South Central Rural Telephone Cooperative Corporation, Inc.; and West Kentucky Rural Telephone Cooperative Corporation, Inc. v. Windstream Kentucky East, Inc.* (Ky. PSC Sept. 27, 2010) (“The Commission has carefully reviewed Windstream’s motion for rehearing...but finds that Windstream offers no evidence not previously considered by the Commission. Accordingly, pursuant to KRS 278.400, rehearing is denied.”).
- Case No. 98-489, *In the Matter of: Application of Blazer Energy Corp., Inc., a Wholly-Owned Subsidiary of Eastern States Oil & Gas, Inc. to Adjust Rates* (Ky. PSC May 17, 1999) (holding that KRS 278.400 “requires parties to Commission proceedings to use reasonable diligence in the preparation and presentation of their case and serves to prevent piecemeal litigation of issues.” The Commission denied the motion for rehearing, noting “Blazer offered no additional evidence which supports its contention...”).
- Case No. 2003-00400, *In the Matter of: Saeid Shafizadeh v. Cingular Wireless* (Ky. PSC April 26, 2005) (denying a motion for rehearing because “Complainant has not referenced any matter which has not already been fully considered by this Commission.”).

Notably, the Water District cites no orders in which the Commission has granted a motion for rehearing in any circumstance, much less in the circumstance presented here. Because the Water District has merely repeated its prior arguments and evidence, the motions for rehearing of the Merits Order and the Strike Order should be denied.

KAW Alternative and Line Losses

The Water District addresses two examples of alternatives to additional storage that it failed to, but should have, considered: the KAW alternative and a line loss reduction program. The Water District again argues that it should not have considered KAW as an alternative source of storage capacity. Since it never considered the idea, we will not know whether an agreement with KAW could be reached, but the Water District should have at least considered such a

solution to its storage capacity issue. It did not do so and continues to refuse to do so. Likewise, when it set out to determine if it needed a one million gallon tank, it did not consider implementing a line loss reduction program and instead claimed at the hearing that it had “very little” non-revenue usage¹¹. Neither of these arguments supports the motion for rehearing.

Smaller Water Storage Facility

The Water District states that it is now reconsidering the reasonableness of constructing a 500,000 gallon tank as an alternative to its one million gallon tank proposal. It therefore appears to propose that the Commission now consider granting a certificate for a smaller tank as part of this proceeding. The Water District requested a certificate to construct a one million gallon tank in this proceeding, not a one million gallon tank or some smaller tank if it cannot obtain a certificate for the larger tank. If the Water District wants the Commission to issue a certificate for a smaller tank, then it must file a new case. It is inappropriate to seek to amend this case after an adverse ruling on the merits. Accordingly, the request for a procedural conference should be denied because, pending disposition of the Water District’s Motion, this case is over.

Conclusion

The Water District’s motions for rehearing of the Merits Order and the Strike Order neither offer or identify any new evidence that was not available at the time of the hearing nor advance any new arguments. The motions should therefore be denied. Apparently realizing that it is not entitled to rehearing of the Merits Order, the Water District requests the Commission to give it the opportunity to try to obtain a certificate for a smaller tank and, incredibly, asks for an instruction manual on how to do it in the form of “declaratory orders.” As the Commission has said, KRS 278.400 “is intended to provide closure to Commission proceedings by limiting

¹¹ 3/13/13 Hearing Transcript at 14:31:28-14:31:31.

rehearing to new evidence not readily discoverable at the time of the original hearing.”¹² It is not, and should not be, a vehicle to prolong this case while the Water District tries to figure out how to offer sufficient proof to support a certificate of public convenience and necessity. The Water District’s Applications, Petitions and Motions should all be denied.

Date: May 30, 2013

Respectfully submitted,

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¹² Case No. 2008-00499, *In the Matter of: Application of Atmos Energy Corporation to Extend Its Demand-Side Management Program and Cost Recovery Mechanism* (Ky. PSC Oct. 12, 2009).

CERTIFICATE OF SERVICE

This is to certify that the foregoing pleading has been served by e-mail and U.S. mail, postage prepaid, to the following persons on this the 30th day of May 2013:

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