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December 15, 2014

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PUBLIC SERVICE  
COMMISSION

**HAND DELIVERED**

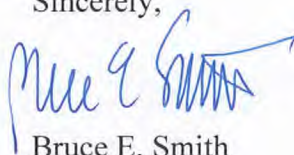
Mr. Jeff R. Derouen  
Executive Director  
Kentucky Public Service Commission  
211 Sower Boulevard  
Frankfort, Kentucky 40601

Re: Case No. 2014-00084  
Jessamine-South Elkhorn Water District CPCN Application

Dear Mr. Derouen:

Delivered under cover of this letter is an original and ten (10) copies of my client's Motion to Submit the Application for Determination on the Record, or in the Alternative to Compel Intervenor's Responses to Certain of the Applicant's Information Requests and to Define the Specific Issues to be Addressed and Limit the Evidentiary Hearing to those Issues, and to Postpone the Date for the Submission of Rebuttal Testimony by the Applicant.

Sincerely,



Bruce E. Smith

Enclosures

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DEC 15 2014

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 ) CASE NO 2014 -00084  
 IMPROVEMENT PROJECT PURSUANT TO KRS  
 278.020 AND 278.300 )

**APPLICANT’S MOTION TO SUBMIT THE APPLICATION FOR DETERMINATION  
 ON THE RECORD, OR IN THE ALTERNATIVE, TO COMPEL INTERVENOR’S  
 RESPONSES TO CERTAIN OF THE APPLICANT’S INFORMATION REQUESTS  
 AND TO DEFINE THE SPECIFIC ISSUES TO BE ADDRESSED AND LIMIT THE  
 EVIDENTIARY HEARING TO THOSE ISSUES, AND TO POSTPONE THE DATE FOR  
 THE SUBMISSION OF REBUTTAL TESTIMONY BY THE APPLICANT**

Comes now the Applicant, Jessamine – South Elkhorn Water District (“JSEWD” or “District”), by counsel, and for its Motion to Submit the Application for Determination on the Record, or in the alternative to Compel Intervenor’s Responses to Certain of the Applicant’s Information Requests and to Define the Specific Issues to be Addressed and Limit the Evidentiary Hearing to those Issues, and to Postpone the Date for the Submission of Rebuttal Testimony by the Applicant, states as follows.

On September 16, 2014, the District responded to a Request for Hearing filed by Intervenor Forest Hills Neighborhood Association, Inc. (“Association”) and argued that the PSC should reject the Association’s request for a hearing since the issues that the



Association intended to address in the hearing had already been presented and reviewed in Case No. 2012-00470 in extensive detail; and that a hearing in an application for a Certificate of Public Convenience and Necessity ("CPCN") such as this is not required by statute; and that therefore a hearing should not be scheduled.<sup>1</sup> The Kentucky Attorney General filed a Reply to the Association's request on September 22, 2014 that shared the District's concern's regarding the need for a hearing. The Kentucky Public Service Commission ("PSC") recognized that it has no obligation to hold a hearing on this application, but decided to schedule a hearing anyway. In that Order, the PSC determined that a hearing should be held due to the "complexity of the issues" in this case. The Commission Order did not limit the issues to be addressed at a hearing, although JSEWD advised even then that the Association intended merely to rehash siting issues that had already been thoroughly reviewed in Case No. 2012-00470.

Since the PSC issued its October 13, 2014, Order, two significant developments have occurred that require this Motion. The first development is that the Association filed its prefiled testimony on October 29, 2014. The second development is that the Association has filed its responses to the District's information requests on November 26, 2014. With these two actions, the Association has presented all of its direct evidence with respect to this Application.

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<sup>1</sup> JSEWD's response is incorporated by reference herein.

Neither the Association's testimony nor its discovery responses include any testimony or evidence with respect to the primary considerations identified by the PSC for a CPCN application such as this application. Neither addresses any of the central issues identified by the PSC in Case No. 2012-00470 which the District would have to address in order to satisfy the PSC that a CPCN approval was warranted.<sup>2</sup>

In that Order, the PSC determined that the District should address the following issues in a new application:

1. Population growth;
2. Demand growth;
3. Fire protection needs; and
4. Suitability of a smaller capacity tank to meet current and future demands<sup>3</sup>

The District has addressed each and every concern expressed by the PSC in that Order, both in its Application (and attachments and supplements) and in its prefiled testimony. The Association, on the other hand, has failed to produce any testimony or evidence on these issues.

The Association was given another opportunity in this Case to identify any objections or concerns that it had on these issues, but refused to produce any evidence contra to the District's evidence, or even to identify any area where it disagrees with

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<sup>2</sup> Case No. 2012-00470, Order of April 30, 2013

<sup>3</sup> Case No. 2012-00470, Order of April 30, 2013 at pp. 10-12.



the District's position and evidence. The Association also refused to answer why, if it had any evidence contra to the District's position of these issues, it had failed to present its objections in prefiled testimony for review by the PSC and JSEWD.<sup>4</sup>

The testimony and evidence with respect to these issues raised by the PSC and fully addressed by JSEWD has been completed in accordance with the PSC's procedural schedule. The Association has chosen not to present any evidence on these central issues, and has chosen not to state any objections to the evidence presented by the District. While the Association may choose to argue that the District has not met its burden of proof on these issues, such argument is just that – argument, not evidence. The Association has had the District's evidence and testimony on these issues for nine months now, and has failed to identify a single area of disagreement despite multiple opportunities to do so. This case is not a civil litigation between two private parties – it is an application for a determination of the public interest and need for water storage facilities. A litigation strategy of an intervenor failing to reveal its objections prior to hearing on issues crucial to the public interest (or possibly that the intervening party has no defensible interest contra to the need for a new facility) is neither fair nor reasonable. The record is complete on the primary issues, and should be submitted as it stands, since all parties have been given a more than reasonable opportunity to present evidence on these issues.

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<sup>4</sup> Association's Responses to JSEWD Information Requests, Q's 16-19 inclusive.



The Association did file testimony stating once again its siting objections. In that testimony, Association witness Mr. Toleman merely reiterates his unsupported speculation as to the impact of the proposed water tank on property values in the Forest Hills Subdivision, while the Association's other witness, Mr. Ritchie, merely adopts his report that was filed in Case No. 2012-00470, without update or amendment other than the presentation of a new aerial photograph of the area surrounding the Switzer site.

In Case No. 2012-00470, the District presented an actual empirical analysis of the impact of a 1 million gallon elevated water storage tank on subdivisions such as Forest Hills, which demonstrated that such a tank would not affect property values.<sup>5</sup> The tank proposed in this proceeding is a 750,000 gallon tank, whose impact certainly would not exceed that of a 1 million gallon tank. This conclusion has already been subjected to significant review and cross-examination by the Association in Case No. 2012-00470.

Mr. Toleman, on the other hand, has not presented any econometric or similar empirical analysis to support his allegation that building an elevated water tank on the Switzer property will result in a 20% devaluation on property values in the Subdivision. There is no new material evidence to review concerning this completely subjective opinion, and this evidence has already been extensively reviewed in Case No. 2012-

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<sup>5</sup> Evaluation performed by Will Berkeley and filed with the PSC in Case No. 2012-00470 on March 11, 2013. The entire record of Case No. 2012-00470 has been incorporated by reference into this proceeding by PSC Order without objection from any party.



00470, and a complete record is already in existence for a decision on the merits of this issue raised by the Association.

Mr. Toleman did update his testimony to the extent of pointing out that property values are increasing in the Forest Hills Subdivision, and that new homes are being built in the Subdivision that are of the same character as the current homes. However, neither fact provides any additional evidentiary support for his 20% reduction theory – indeed this information begs the question of how his assertion can be correct when values in the Subdivision are increasing and new homes are being built despite the known plans for the Switzer lot.

With respect to Mr. Ritchie's testimony, the PSC in Case No. 2012-00470 granted the District's Motion to further investigate the sites suggested by Mr. Ritchie, which resulted in a substantial delay in that proceeding. JSEWD responded with an extensive evaluation on those proposed sites<sup>6</sup>, which the Association had a complete opportunity to review and challenge as best it could. This was in addition to an extensive record of all of the alternatives that had been reviewed by the District prior to even filing its application in Case No. 2012-00470. There is simply no more to discuss. The record is already complete for decision on this issue raised by the Association.

The record in Case No. 2012-00470, which has already been incorporated by reference in this proceeding, includes a more than full investigation of the Association's siting claims, including testimony from all parties to that case, extensive examination of

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<sup>6</sup> Evaluation conducted and sponsored by John Horne in Case No. 2012-00470, filed with the PSC on February 25, 2013.



these witnesses on the merits of these claims, and rebuttal testimony from JSEWD including actual studies on these same issues.

The PSC did not make a determination in Case No. 2012-00470 with respect to the siting issue that is central to the Association<sup>7</sup>, finding that the issue was not a primary consideration but that the Application was insufficiently supported on other grounds. The District's position is that it has extensively reviewed alternative sites already, the site selection is clearly appropriate, and the record is more than complete as to the Association's complaint that the site should be changed from a clearly appropriate site to some other site more to their liking. As there is already an extensive record on the siting complaints, there is no rational basis for a further hearing on this regard, and the siting issue should be decided on the current record (including relevant evidence from Case No. 2012-00470). The record is already more than sufficient with respect to the Association's siting complaints for the PSC to reach a conclusion with respect to these complaints and the appropriateness of the Switzer site for an elevated storage tank.

Wherefore, the District moves that the PSC determine that the record in this proceeding, together with the extensive record of Case No. 2012-00470, is sufficient to allow the submission of this case for the decision on the current record. JSEWD has no objection to allowing the District and the intervening parties to submit a brief in which the parties may present such argument as they may have with respect to the issues

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<sup>7</sup> There can be no doubt from the record in the last case and their testimony in this case that the Association will oppose any water tank on the Switzer site.



and evidence on the record, in order to assist the PSC in evaluating the evidence in the record. The record as it stands is more than sufficient for decision, and all parties have been given a more than reasonable opportunity to present any evidence that they have in support of their positions.

In the alternative, if the PSC determines that some issues should be subject to further examination at an evidentiary hearing, the District respectfully moves that the PSC delineate with specificity the issues to be addressed at such hearing, and limit or exclude the siting and real estate valuation issues raised by the Association from further examination at such hearing, as a voluminous record has already been created with respect to such issues, and no new material evidence has been presented by the Association in support of its siting allegations.

The District also moves in the alternative that the Association be compelled to provide complete answers to the District's Q's 16-19, inclusive, in order that the District may have a fair understanding of the Association's objections to the District's evidence on the primary considerations as delineated by the PSC. The District does not seek to invade any legitimate work product privilege or attorney/client privilege, but it does have the right to be informed as to the nature and substance of any such objections, and whether there is any evidentiary basis for such objections. Should the Association be permitted to withhold its objections by failure to file any testimony on the primary issues or even detail any objections that it has on such issues, the District will be prejudiced in that it will not have any basis to file rebuttal testimony or otherwise respond to such objections other than in a trial by ambush at the evidentiary hearing.



Such a process is fundamentally unfair to the District, and also is inconsistent with a fair determination of the public convenience and necessity (as compared to the Association's perceived private interest) that is central to this application.

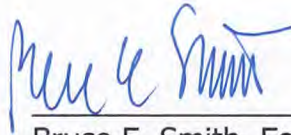
The District also respectfully requests that the date for submission of its rebuttal testimony be postponed pending the PSC's determination with respect to this Motion. The resolution of this Motion may obviate the need for rebuttal testimony, and in any event will affect the District's determination of what rebuttal testimony may be necessary and on what issues. As the hearing in this matter is not scheduled until February 10, 2015, resolution of this motion will not require a delay in the scheduled hearing if there is still a need for rebuttal testimony and an evidentiary hearing in accordance with the PSC's ruling on this Motion.

WHEREFORE, the District respectfully moves that the Commission grant its Motion to Submit the Application for Determination on the Record, or in the Alternative to Define the Specific Issues to be Addressed and Limit the Evidentiary Hearing to those Issues and to Postpone the Date for the Submission of for Rebuttal Testimony by the Applicant.

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**AND**





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**CO-COUNSEL FOR DISTRICT**

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing Motions was emailed and mailed to the following individuals, postage prepaid, on December 15, 2014.

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Jennifer Black Hans, Esq.  
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Bruce E. Smith

Bes\JSEWD\Forest Hills\Second APP.\Pleadings and Motions\Motion to Submit, etc.