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December 22, 2014

VIA UPS OVERNIGHT

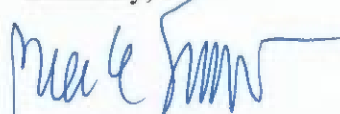
Mr. Jeff R. Derouen
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, Kentucky 40601

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 **APPLICANT'S REPLY TO FOREST HILLS RESIDENT'S ASSOCIATION RESPONSE TO 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.**

Sincerely,


Bruce E. Smith

Enclosures

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PUBLIC SERVICE
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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 REPLY TO FOREST HILLS RESIDENT’S ASSOCIATION RESPONSE
TO 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**

Comes now the Applicant, Jessamine – South Elkhorn Water District (“JSEWD” or “District”), by counsel, and pursuant to 807 KAR 5:001 Section 5(c), it respectfully submits this Reply to the Response of Intervenor Forest Hills Residents’ Association, Inc. (“Association”) filed on December 18, 2014 (“Response”).

I. MOTION SPEAKS FOR ITSELF

While the Association makes a number of references to, and interpretations of, the content and intent of the District’s December 15, 2014 Motion (the “Motion”), the Motion speaks for itself and is not altered or amended by the Association’s

interpretations.

II. REPLY TO SELECTED CONTENTIONS IN RESPONSE

For its Reply to selected arguments and contentions in the Response, the District states as below. Given the number of such claims, failure to address a particular criticism directly should not be read to indicate assent. In addition, the District's Motion is incorporated herein by reference.

• The Association Misstates the District's Motion with Respect to Burden of Proof.

The Association asserts that the District has made an "erroneous assumption" in its Motion that the Association has a burden of proof in this proceeding.¹ The District has not stated or made such an assumption in its Motion. The District clearly stated that the Association might argue that the District has failed to meet its burden of proof on the paramount² issues in this Application – but that such a claim is argument, not evidence.³ If the Association wanted to present evidence on the paramount issues, it has had plenty of opportunity to do so, and has chosen not to. Its evidence is complete, and it has chosen not to provide any evidence on the paramount issues as identified by the PSC⁴. It should not be heard to now complain about the consequences of its own litigation strategy, or to present evidence indirectly by attorney questioning.

¹ Association's Response at page 1.

² This important term is discussed in detail below.

³ JSEWD Motion at page 4.

⁴ See JSEWD Motion at page 3 – population growth; demand growth; fire protection needs; and suitability of a smaller capacity tank to meet current and future demands. See also, Case No. 2012-00470, Order of March 8, 2013 at pp. 4-5 for discussion of paramount concerns. See also, additional discussion of how paramount issues were identified by the PSC below.

• **The Association Has Presented No Evidence on the Paramount Issues.**

The Association claims that its failure to present any evidence with respect to the paramount considerations in this proceeding is "irrelevant".⁵ It was the PSC that determined which issues are the paramount considerations, and established the relevance and weight of various issues.

In Case No. 2012-00470, the PSC considered whether the Association should be permitted to introduce Photo Science's report and Mr. Toleman's testimony on an alleged impact on real estate values of a the elevated tank proposed in this proceeding. While the PSC permitted such evidence to be presented, it made it very clear that such issues were not paramount issues in such an application.⁶

The plain meaning of paramount is as follows:

1. chief in importance or impact; supreme; preeminent;
"a point of paramount significance"
2. above others in rank or authority; superior in power or jurisdiction.⁷

The Association has not presented a scintilla of evidence with respect to the paramount considerations despite a clear opportunity to do so. The Response merely lists general captions of the paramount issues as well as the Association's siting and related issues, and provides no adequate notice of claims that the Association is planning on raising at the Association's desired evidentiary hearing. As the Association has offered no evidence on the actual paramount issues, it has no case to present on these issues,

⁵ Response at page 2.

⁶ Case No. 2012-00470, Order of March 8, 2013 at pp. 4-5.

⁷ Dictionary.com

other than arguing that the District has not met its burden despite the voluminous testimony and exhibits presented in this proceeding. It has waived the right to present additional evidence on the paramount issues, either directly or indirectly.

• **The Association Ignores the Public's Interest Herein and PSC Regulations.**

The Association's Response treats this application for approval of a facility in the public interest as if it is civil proceeding for private relief or damages. It likens the District's Motion to a motion for directed verdict⁸, although there is no such procedure or equivalent under PSC statutes or regulations. The Association does not seem to recognize, or cannot accept, that this is an application for a facility that is needed to meet the public interest and comply with PSC regulations.⁹ The Association is opposed to a storage facility, however necessary for the public interest and regardless of the regulations, being located on the Switzer site. The Association is not the representative of the class of the District's customers, or any subset thereof, other than certain landowners in the Forest Hills subdivision. The District and the PSC have to consider the interests of all of the District's customers (as does the Attorney General), not merely Mr. Davis and those who might agree with his siting position. Not only do all District customers have a fundamental interest in the District being able to provide safe, adequate and reliable service to meet their needs, but the PSC requires such. All district customers, including residents of Forest Hills who disagree with Mr. Davis on this Application, have the right to seek information and communication with the District about their concerns. The District objects to giving any intervenor the veto power that

⁸ Response at page 2.

⁹ See, for example but without limitation, 807 KAR 5:066, Section 4(4); the PSC has already determined in Case No. 2012-00470 that JSEWD needs additional storage to comply with this regulation.

the Association seeks over the long held Switzer site as a *quid pro quo* for approval of a facility that is required to meet the public interest in a safe and reliable manner.

• **The Association Has Waived Its Right to Present Further Evidence on the Paramount Issues.**

Having no evidence or expertise to offer on the paramount considerations, the Association nevertheless demands the right to make its case by cross-examination. The Association claims that the District is trying to introduce testimony or evidence by attorney argument, when it apparently intends to introduce its entire case (if any) on the paramount considerations through “cross-examination” at the scheduled hearing. The Association states that it intends to “discuss” the District’s storage analysis and the District’s population study at an evidentiary hearing.¹⁰ How does the Association intend to “discuss” these issues? By making speeches of counsel? By “discussing” its hidden position through careful tailoring of cross-examination question content? Having voluntarily foregone the opportunity to openly present evidence on the paramount considerations through a witness or respondent with expertise in these technical areas, the Association now demands the opportunity to present its case on the paramount issues by inference from cross-examination by attorneys. The Association presumably understands that the purpose of prefiled testimony is to allow experts to address complex issues such as these in an orderly, open and fair manner. The Association gains the additional unfair advantage of making it impossible for the District to file rebuttal testimony on the paramount issues once the Association’s objections are finally revealed. The District is lambasted for its alleged conduct throughout this Response,

¹⁰ Response at page 3

including but not limited to trying to “stack the deck”.¹¹ In fact, the District has put its cards on the table. The Association is holding one or more jokers face down. Such a procedure is simply not fair, not reasonable and the PSC should not sanction it. As the Association has refused the opportunity to present any evidence on the paramount issues or reveal its objections (if any), the record on such issues is complete for submission. The Association may argue any claim it has with respect to burden of proof in a brief.

• **The Association’s Charge that the District Wrongfully Attempted to Put Evidence into the Record through Attorney Argument is Without Merit.**

The Association states that the District’s Motion “wrongfully attempts to put evidence in the record regarding Forest Hills testimony through attorney argument”.¹² As the Association fails to specifically identify what it considers to be “testimony” or “evidence” in the form of argument, JSEWD cannot respond to this contention other than to say that argument from facts and evidence already in the record is not testimony or evidence, it is argument. The Motion speaks for itself. In an apparent attempt to buttress the above argument, the Association states that “the Commission ruled against this very practice in Case No. 2012-00470 involving these parties”, citing generally an Order dated April 30, 2013. There were two orders issued on that date. Neither makes the finding that the Association claims. The Association did seek to strike certain references in the District’s brief in Case No. 2012-00470.¹³ As the PSC said in

¹¹ Motion at page 5.

¹² Response at page 3.

¹³ As the Association’s Response is not specific enough to discern, the District addresses this argument on the assumption that this is the ruling referred to and being bootstrapped into a completely different issue.

that Order:

Forest Hills Residents' Association, Inc. ("Forest Hills") and William Bates (collectively "Intervenors") have moved to strike portions of Jessamine-South Elkhorn Water District's ("Water District") brief for referring to materials **not part of the record** [emphasis added].¹⁴

The issue in that Order was whether a party might refer in a brief to "materials for other Commission proceedings that have not been introduced or incorporated by reference into the record of this proceeding or are not specifically set forth in a Commission Order".¹⁵

The issue in that proceeding was totally unrelated to what the Association now argues. The issue then under review was entirely related to argument about reference to documents in the PSC files that had not been specifically incorporated by reference at the close of evidence. All of the District's argument in this Motion concerns evidence that has already been filed in this proceeding by either the District or the Association, or incorporated by reference by PSC Order.

• **The Attorney General Has Not Requested a Hearing.**

The Association states that "under JSEWD's theory, the Office of the Attorney General ("AG") would not be permitted to participate at a hearing."¹⁶ The Attorney General is charged with representing the public interest and the interest of all of the District's customers, not just the interests of a select few as with the Association. The Association ignores the reality of the circumstances and record in this case in that the Attorney

¹⁴ Order of April 30, 2013 at page 1.

¹⁵ Order of April 30, 2013 at page 5. The PSC did strike certain specifically identified references based on a finding that they referred to evidence not in the record at the close of evidence; the Association does not cite to any such references in this Response.

¹⁶ Response at page 3.

General did not request a hearing, and indeed filed a reply¹⁷ to the Association's request for a hearing that recognized the heavy burden that is placed on utilities such as JSEWD, as well as the Attorney General, in such cases as this when no point is served by a hearing. The Association's claim that JSEWD is trying to curtail the Attorney General's role in a hearing is most ironic in that the Association's failure to present any testimony or evidence on the paramount issues precludes any cross-examination of the Association by any party on any position that the Association may ultimately take on the paramount issues.

• **The Association's Claim that JSEWD Seeks to Deny the Commission and Its Staff the Opportunity to Participate in a Hearing Ignores Reality.**

The Association claims that the District is trying to curtail the PSC staff's and the Commissioners' role in this proceeding. The staff has not requested a hearing. The PSC did not schedule a hearing on its own motion. Only the Association has asked for a hearing. No hearing is required by law. If the PSC or its staff demands that the parties appear for a hearing because the staff or Commissioners have unanswered questions, of course there will be a hearing.¹⁸ If such a hearing is to be held for the benefit of the PSC staff or Commissioners, the District reiterates that it should be advised with particularity as to the issues to be addressed at such a hearing, and that the Association should be required at a minimum to provide a detailed statement of any objections it

¹⁷ Reply and Statement of the Attorney General dated September 19, 2014. See also, PSC Order of October 13, 2014, in which the PSC specifically found that the Attorney General did not believe that any hearing was necessary in Case No. 2014-00084.

¹⁸ The PSC has the right to schedule a hearing if needed for its own investigation, but is not required to hold a hearing in this case merely to further the Association's convoluted litigation strategy. Of course, since the Association will not reveal its position or evidence (if any) on the paramount issues, it is itself curtailing the role of the staff and the Commissioners in a hearing.

has to the Application on the primary issues.

• **The District Has Investigated other Sites Since 2010.**

The Association misstates the facts in claiming that the District has not considered any additional sites since 2010.¹⁹ Even aside from other efforts, Case No. 2012-00470 was suspended at JSEWD's request for over two months while the District investigated all of the sites recommended by the Association's expert. An extensive report was filed with the PSC, and that report has been incorporated into the record of this proceeding.²⁰ Whether or not the Association accepts the results, numerous additional sites have been investigated since 2010.

• **The District Should Be Treated the Same As Any Other Water District.**

The Association argues that the District should be treated the same as any other utility seeking to construct such a facility. The District fully concurs. Unfortunately, this District has been the target of an extraordinary level of scrutiny for a water district request for approval of an elevated storage tank based on aesthetics claims, flyby investigations and real estate speculation. The Association has not cited to a single PSC Order where a water district has had to respond to Photo Science's claims (or similar siting claims), or to speculation about real estate values or view lines with respect to a proposed water storage tank. The District assembled its case to answer the paramount questions posed by the PSC. Other issues raised by the Association with respect to the Switzer site and alternatives considered were already reviewed in great detail in Case No. 2012-00470, the entire record of which has been incorporated herein by reference.

¹⁹ Association's Response at page 3.

²⁰ For further discussion, see JSEWD Motion at page 6.

• **The District Is Entitled to Fair Notice of the Association's Objections.**

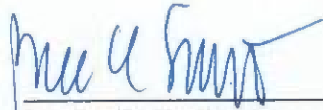
The District is not asking the Association, or anyone else, to help it prepare for hearing. It is entitled to fair notice of any intervenor's objections to its Application and the basis therefore, particularly with respect to the paramount considerations. The Association has not made any effort to challenge the District's case on the paramount issues. The Association's only evidence relates to blocking needed and required storage capacity as long as it is located on the Switzer site.

CONCLUSION

For the reasons stated in its Motion, and for all of the reasons stated herein, the District respectfully requests that the PSC grant the relief sought in its Motion and allow this case to be submitted on the evidence that the parties have chosen to submit, to be briefed by the parties on the record if they desire; or if this relief is not granted, expeditiously grant the alternative relief sought by the District, including the right to be fully apprised of the issues that parties intend to raise with respect to the paramount issues as well as the opportunity to file rebuttal testimony as needed to respond to the Association's claims and maintain the scheduled hearing date of February 10, 2014.

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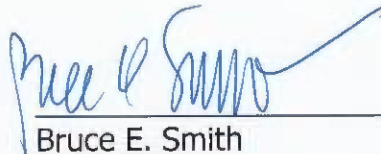
CO-COUNSEL FOR DISTRICT

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing Reply was emailed and mailed to the following individuals, postage prepaid, on December 22, 2014.

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