

BRUCE E. SMITH LAW OFFICES, PLLC

201 SOUTH MAIN STREET  
NICHOLASVILLE, KENTUCKY 40356  
(859) 885-3393 + (859) 885-1152 FAX

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APR 21 2015

PUBLIC SERVICE  
COMMISSION

BRUCE E. SMITH  
bruce@smithlawoffice.net

HENRY E. SMITH  
henry@smithlawoffice.net

April 20, 2015

**VIA UPS OVERNIGHT DELIVERY**

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 the **Applicant's Objection and Motion to Strike**.

Sincerely,



Bruce E. Smith

Enclosures

cc: Robert M. Watt, III, Esq.  
Monica H. Braun, Esq.  
Jennifer Black Hans, Esq.  
Gregory T. Dutton, Esq.  
Stefanie Kingsley, Esq.  
Ann Ramser, Esq.  
Anthony G. Martin, Esq.

**COMMONWEALTH OF KENTUCKY**

**BEFORE THE PUBLIC SERVICE COMMISSION**

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APR 21 2015

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

**CASE NO 2014 -00084**

**APPLICANT’S OBJECTION AND MOTION TO STRIKE**

Applicant Jessamine – South Elkhorn Water District (“JSEWD” or “District”), by counsel, objects to and moves to strike certain portions of the brief of Intervenor, Forest Hills Residents’ Association, Inc. (“Forest Hills” or “Association”) for the reasons stated below.

**I. Background**

The Commission’s procedural Order in this proceeding established dates for the filing of testimony by any party that desired to do so. The District prefiled its direct testimony with its Application on March 10, 2015. After discovery, the Commission Ordered that any Intervenor testimony be filed on or before October 29, 2014. By that time, the District’s direct testimony had been available to Forest Hills for review for over seven (7) months. Forest Hills thus had ample opportunity to retain experts and present expert testimony on any issues that it desired.

While Forest Hills filed testimony from three witnesses, it did not file any testimony with respect to population or demand projections, emergency needs, fire protection demands or

minimum demands. Further, Forest Hills refused to identify disagreements or issues that it had with either the District's demand projections or the studies prepared by Horne Engineering which were properly presented as expert witness testimony and evidence by the District.<sup>1</sup> It further refused to identify any experts that were engaged to assist in these technical areas, instead referring to its continuing investigation through counsel.

The District objected to Forest Hills's failure to present any evidence on what the Commission had previously identified as the paramount issues, and to Forest Hills' evident intention to "testify" through counsel on these issues.<sup>2</sup> The Commission denied the District's request that Forest Hills be required to respond to questions 16-19. While the District was given an opportunity to file rebuttal testimony, it could not address Forest Hills' "position" on these issues because Forest Hills was not required to take a position or present expert testimony or even respond with respect to these paramount issues.

## II. STANDARDS FOR TESTIMONY

The Commission requires that "[a]ll testimony given before the commission shall be given under oath or affirmation." 807 KAR 5:001, Section 9(7). Any party objecting to testimony is required to state the grounds for objection. 807 KAR 5:001, Section 9(8). While the Commission is not strictly bound by the technical rules of legal evidence, the Kentucky Rules of Evidence provide that lay witnesses may only offer testimony in the form of opinions or inferences in very specific circumstances, and not when those opinions or inferences are "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." KRE 701. Under KRE 702, an expert must be qualified as such, not merely assumed to be an

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<sup>1</sup> Forest Hills Responses to JSEWD First Requests Nos. 16, 17, 18 and 19.

<sup>2</sup> See JSEWD Motion to Submit, *etc.* filed December 15, 2014. JSEWD continues to object to this procedure, and nothing herein should be viewed or construed as a waiver of such objection.

expert. An opposing party has the right to cross-examine any witness presenting expert testimony under KRE 703. A person presenting expert opinions is required to be present for cross-examination to disclose underlying facts or data.

Although these rules are not binding on the Commission, they are reasonable rules and procedures for presenting expert testimony, opinions and inferences. Explicit in these rules is that if a party wishes to offer testimony, inferences and opinions on technical areas, such person must be qualified to do so, and such testimony, inferences and opinions must be subject to cross-examination.

### **III. COUNSEL'S TESTIMONY IN FOREST HILLS' BRIEF**

Forest Hills brief contains unsworn statements by counsel offering analysis, opinion and inference that the District respectfully submits go beyond argument by counsel and clearly are objectionable. Even allowing a broad latitude to counsel to present argument concerning testimony and exhibits presented by the District's qualified experts, Forest Hills is attempting in a brief to offer alternative analyses and opinions without any proper foundation. In addition, by withholding its testimony until its brief, Forest Hills has denied the District the opportunity to examine such opinions and inferences, or to present rebuttal testimony as provided for by the Commission in its procedural schedule.

Forest Hills' counsel testimony, opinions and inferences are woven throughout several sections of its brief. This counsel testimony, as opposed to citations to the record or argument of counsel, creates new analyses, opinions and inferences that are properly required to be under oath, timely filed, and submitted by an established expert, all subject to a full opportunity for cross-examination and rebuttal testimony. The following are examples of such unreasonable and improper testimony by Forest Hills' counsel:

### **A. Opposing Counsel's Testimony Regarding Storage Capacity**

From page 5 through page 10 of its Brief, Forest Hills finally favors the District and the Commission with its version of testimony on the paramount issues that the Commission has previously identified. Beginning with the first sentence of Section B(i) on page 5, Forest Hills' counsel proclaim that average day demand is the most fundamental component in establishing utility capacity needs. This is not presented as a legal conclusion or supported by any authority, but as a prelude to counsel preparing their own analysis of average daily demand, and incorporating that analysis into an alternative study of capacity needs. At the bottom of that page, in the last full paragraph, counsel purports to introduce evidence as to the Commission's findings in Case No. 2012-00470 regarding average day demand. The Commission in fact found in that case that the District had established an average day demand of 709,200 gallons; that the District was out of compliance with 807 KAR 5:066, Section 4(4); and that as of the date of that Order a present capacity deficit of 159,200 gallons existed. The Commission did not make the "finding" that counsel claims. Had counsel presented a witness, or even a response to JSEWD data requests, presenting this erroneous testimony in a sworn, proper and timely manner, this obvious error of over 90,000 gallons would have been corrected early on, rather than requiring a motion to strike after Forest Hills' filed its brief.<sup>3</sup>

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<sup>3</sup> Forest Hills's proposed average daily demand of 619,253 gallons as the "proper" average daily demand is 89,947 gallons short of the 709,200 gallons already determined by the Commission in its April 30 Order in Case No. 2012-00470. Order at page 5; also finding is repeated at page 12. The Commission also found that JSEWD is out of compliance with the Commission's storage regulation. See April 30, 2013 Order at pages 5 and 13. Forest Hills was a party to that case, and made no objection to that determination. Had Forest Hills presented testimony on this and other points, the District would have had a fair opportunity to respond. By presenting its case for the first time by counsel testimony in its brief, Forest Hills would deny the District the opportunity to respond to and correct such egregious errors.

Similar counsel testimony is found on page 6, where counsel testifies that, based on their erroneous claim as to the minimum daily demand finding in Case No. 2012-00470, the District has overstated demand by 124,000 gallons or 20%. The same 20% claim is also presented at page 7. There is no expert testimony or even information response supporting this unsworn opinion and conclusion, only the testimony provided for the first time in a brief by counsel.

Opposing counsel then goes on to try to sponsor additional expert analysis, opinions and inferences. As stated by counsel at pp. 7-8:

With respect to equalization storage, which the Water District states is the volume of water required to allow the system to operate with a supply of an average demand for the maximum day, the Water District selected 30% of its maximum day usage as the appropriate calculation. In contrast, a storage capacity analysis performed by Kentucky-American Water Company that the Water District moved for incorporation into this case utilized 12% to 15% of its maximum day usage to calculate equalization storage. [fnt. omitted] Several of the authorities cited by the Water District demonstrate that the 30% factor is unreasonably high: "[t]ypically the equalization storage requirement is between 15% and 30%" of the maximum day usage and "...equalization storage could exceed 30% for small service areas or and climates [fnt omitted]. Had the Water District used a more moderate equalization storage factor, such as 15% or even 20%, the equalization storage requirement drops from 583,275 gallons to 267,638 gallons or 356,850 gallons.

Forest Hills has not presented any evidence or testimony on these issues prior to its counsel's testimony and alternative, unsworn "expert" analysis and calculations of what its counsel considers to be "a more moderate equalization factor". However, Forest Hills' counsel denigrate actual sworn, timely opinions from qualified experts in favor of their own advocacy analysis. For an example of properly presented expert testimony and analysis, as opposed to Forest Hills' counsel testimony, the Storage Analysis attached to the District's Application and cited by Forest Hills above is how an actual expert reviews relevant technical material. That

Analysis at pages 22-25 (attached hereto for reference) demonstrates why expert testimony should be presented by expert witnesses.

Forest Hills' counsel testifies that "several of the authorities cited by the Water District support their opinion that 30% of maximum day usage is "unreasonably high". In fact, all of the authorities cited by the District support a conclusion that 30% is reasonable, although one does include a lower range of 15% as possibly reasonable as well. All of the other authorities fully support the 30% selected by the **experts** who testified for the District. Ironically, Forest Hills also includes in its counsel testimony cited above that "equalization storage could exceed 30%" under appropriate conditions. Forest Hills' counsels' unsworn, untimely and inexpert opinion as to what they believe should be a proper reservation percentage should be stricken.<sup>4</sup>

Forest Hills then proceeds to submit unsworn, inexpert and untimely opinion as to the equalization storage component under what it claims is a "more moderate" equalization storage factor, including a calculation by counsel of a significantly decreased equalization storage requirement. Once again, counsel merely asserts its own foundationless opinion for that of a qualified expert. The Commission should not reward this sort of unreasonable and unfair case presentation strategy by giving any weight whatsoever to the results of Forest Hills' "investigation through counsel" approach to review of technical and complex issues that require expert analysis.

On page 9 and the top of page 10 of its brief, Forest Hills criticizes the District for relying on sworn testimony of actual experts that was timely presented regarding the technical field of planning for storage. Forest Hills' counsel follows this criticism with their testimony, for the first time in its final pleading in the case, advancing Forest Hills' position as to what would constitute

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<sup>4</sup> Again, had Forest Hills presented sworn expert testimony or even timely response, this highly fanciful and fallacious testimony would have been corrected without the necessity of this Motion.

“accurate and reasonable” levels of storage needs, complete with chart. Forest Hills derides the “unsupported opinion” of engineers on engineering issues, but then hypocritically attempts to substitute unsworn lawyer testimony, opinion and inferences that have not been subjected to review or examination. Forest Hills ignores not only the properly presented analysis by the District’s experts, but the Commission’s uncontested finding in its Order of April 30, 2014 in Case No. 2012-00470 that JSEWD was out of compliance with Commission minimum storage regulations with a deficit of 159,200 gallons even before any consideration of growth, emergency needs, fire protection or other relevant capacity considerations.<sup>5</sup> Forest Hills has not offered any actual expert testimony to support its position, only counsel testimony, and has not offered even this improper evidence and analysis in a timely manner.

The District respectfully requests that the Commission strike from the record those portions of Forest Hills brief described above that constitute counsel testimony.

#### **B. Forest Hills’ Counsel’s Testimony on Population Growth**

On pages 11-15 of its Brief, Forest Hills’ counsel present a long exposition of their testimony concerning population and demand projections. Opposing counsel’s testimony begins immediately at the top of page 11, and continues with their own counter-analysis of population and demand growth, conjecturing on how such a study should be conducted and what the result should be. Forest Hills chose not to retain an expert to review the District’s population and growth study, and opposing counsel admittedly does not understand even the basics of the analysis as a result. Rather than have an expert in the field explain Mr. Harper’s study and

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<sup>5</sup> Forest Hills’s proposed average daily demand of 619,253 gallons as the “proper” average daily demand is almost 100,000 gallons short of the 709,200 gallons already determined by the Commission in its final Order in Case No. 2012-00470. Forest Hills was a party to that case, and made no objection to that determination. Had Forest Hills presented testimony on this and other points, the District would have had a fair opportunity to respond. By presenting its case by lawyer testimony in its brief, Forest Hills would deny the District the opportunity to respond to and correct such egregious errors.

approach to them, as well as the very clear post-hearing data response in which Mr. Harper fully explains how “split” census blocks were divided, Forest Hills merely bemoans its inability to understand. This does not, however, stop counsel from testifying in its brief as to what methodology it would prefer to use – that is, if it had a witness who was qualified to present such evidence. It does not. The only apparent result of this lawyer testimony is to obstruct and confuse in favor of Forest Hills’ true interest in this proceeding, which it succinctly states as follows: “The tank, if deemed necessary, should be constructed elsewhere.”<sup>6</sup>

At the request of Forest Hills, JSEWD witness Harper, as part of a post hearing data request, fully explained how he calculated the population served by JSEWD in 1990, 2000 and 2010. He also provided spreadsheets that clearly demonstrated how those population totals were calculated, including therein “split” census blocks. He also dispelled the confusion that Forest Hills’ counsel still relies on between Census Block Groups and Census Blocks, and has stated clearly and consistently that his population analysis is based on JSEWD service area growth as determined by census blocks, not census block groups. Had Forest Hills properly presented any claims that it has through timely and sworn expert testimony, perhaps such an expert could have dispelled counsel’s confusion. In any event, such a presentation would have given the District an opportunity to review and challenge such claims, instead of having to file a motion such as this.

Neither of Forest Hills’ lawyers have established credentials to provide expert testimony or alternative analysis to that presented by JSEWD’s experts. In violation of PSC regulations, Forest Hills’ testimony is neither sworn nor affirmed and it was not timely presented pursuant to the procedural schedule established by the Commission. JSEWD has previously objected to Forest Hills’ expected litigation tactic of not presenting any expert testimony on the paramount issues and it’s refusing to identify any issues it had with JSEWD’s experts’ presentation. Forest

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<sup>6</sup> Forest Hills Brief at page 37.

Hills' brief fully corroborates this unfair and unreasonable litigation approach which results in an egregious denial of due process to JSEWD because no reply, investigation, discovery or rebuttal from actual experts is possible. The District again objects to opposing counsel's thinly veiled testimony and to Forest Hills use of this "evidence", opinions and inferences through such testimony.

The District respectfully requests that the Commission strike from the record those portions of Forest Hills' brief as described above that constitute counsel testimony.

### **C. Citation to Ongoing Investigation**

Forest Hills has also for the first time in its Brief insinuated that a recent show cause Order issued by the Commission on April 2, 2014 is somehow a reason to deny the District's Application for safety reasons.<sup>7</sup> Forest Hills' counsel infers that the unfortunate accident involving a 30 year old standpipe is somehow relevant to the construction proposed by the District, and that therefore the proposed CPCN should be denied. It would be equally illogical to argue that all water storage tanks in Kentucky should be shut down because it is theoretically possible that one might release its water and cause damage. Numerous other ground and elevated storage tanks operated by utilities across the state are subject to the same hypothetical criticism. The District is required, and committed, to meet or exceed all applicable safety requirements for this proposed tank. It is not proposing to construct a thirty year old standpipe. It will meet or exceed all of the requirements of 807 KAR 5:066 Sections 7 and 11. While

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<sup>7</sup> The Commission has issued a show cause Order in Case No. 2015-00037 on April 2, 2015. The US 60 Water District has filed a reply denying any violation of PSC regulations. The investigation into that incident is still pending, and the District (unlike Forest Hills' counsel) offers no opinion and implication as to the issues raised by the show cause Order and the ongoing investigation. However, it is undisputed that what is involved is a 30 year old standpipe, not a new elevated storage tank.

Forest Hills may refer to relevant Commission Orders, the District objects to citation to an Order in an ongoing investigation and to counsels' inference that the facts in that case demonstrate that this proposed tank, or all ground and elevated tanks under the Commission's jurisdiction, are unsafe.

**WHEREFORE**, JSEWD respectfully moves that the Commission strike the attorney testimony and new evidence, opinion and inference presented by Forest Hills in its brief, and limit its consideration of evidence, opinion and inference put forward by Forest Hills to that evidence, inference and opinion that has been properly and timely submitted by expert opinion or timely response to information requests.

Anthony G. Martin, Esq.  
P.O. Box 1812  
Lexington, Kentucky 40588  
agmlaw@aol.com  
(859)268-1451

**AND**



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Bruce E. Smith, Esq.  
Henry E. Smith, Esq.  
Bruce E. Smith Law Offices, PLLC  
201 South Main Street  
Nicholasville, Kentucky 40356  
bruce@smithlawoffice.net  
(859)885-3393

**CO-COUNSEL FOR DISTRICT**

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing Applicant's Motion to Strike was mailed to the following individuals, postage prepaid, on April 20, 2015.

Robert M. Watt, III, Esq.  
Monica H. Braun, Esq.  
300 West Vine Street, Suite 2100  
Lexington, KY 40507

Jennifer Black Hans, Esq.  
Gregory T. Dutton, Esq.  
Stefanie Kingsley, Esq.  
Assistant Attorneys General  
1024 Capital Center Drive, Suite 200  
Frankfort, KY 40601-8204



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Bruce E. Smith

**STORAGE ANALYSIS EXCERPT**

(Pages 22 – 25)

## VI. STORAGE REQUIREMENTS

Storage Volume Components Based on Industry Standards -Based on methods that are standard to the industry, the storage requirement of a distribution system is made up of the sum of three (3) components. They include (1) Equalization Storage, (2) Fire Storage, and (3) Emergency Storage.

Equalization Storage – the first component of required storage that is typically considered is equalization storage. Equalization storage is the volume of water required to allow the system to operate with a supply of an average demand for the maximum day. Therefore, during the peak hours of usage during a maximum day, the tank would lose volume only to gain the volume back during the slack hours of usage during that same maximum day. If the equalization volume is sized correctly, the system continues to operate even through a maximum day demand. “In most communities this is based on the maximum day condition...”<sup>28</sup> “The largest volume type is operational (or equalization) storage... Operational capacity is the volume of water supplied during a maximum water use day that is required during periods when the demand is greater than the maximum day average.”<sup>29</sup>

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<sup>28</sup> Computer Modeling of Water Distribution Systems, Third Edition, AWWA Manual M 32, @ 116

<sup>29</sup> The Comprehensive Water Distribution Systems Analysis Handbook for Engineers and Planners by Boulos, Lansey, and Karney @ 7.34

Equalization volume is typically calculated by multiplying a factor times the maximum day demand. This factor can vary based on the size of the system and circumstances surrounding the source. "The amount of equalization storage maintained by a community should be determined based on comparison of the production capabilities versus the demands expected on the system. In most communities, this is based on the maximum day condition and ensuring that the equalization storage is sufficient to meet the demands that exceed the production capabilities. ...equalization storage could exceed 30% for small service areas or arid climates."<sup>30</sup>

In a chapter titled, "Hydraulic Design of Water Distribution Storage Tanks," Thomas M. Walski, who at the time was working for Pennsylvania-American Water Company, a sister company of Kentucky-American Water Company, lists equalization volume needed as a fraction of maximum daily demand being 0.25 to 0.50 for systems using off-peak pumping.<sup>31</sup> Off-peak pumping refers to systems that rely on slack demand periods to fill the tanks, which is applicable to Jessamine-South Elkhorn Water District. "Typically the equalization storage requirement is between 15% and 30% of the MDD."<sup>32</sup>

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<sup>30</sup> Computer Modeling of Water Distribution Systems M32, Third Edition, AWWA @ 116

<sup>31</sup> Water Distribution System Handbook, Larry W. Mays, McGraw-Hill Handbook @ 10.13

<sup>32</sup> CDM Smith, Preliminary Engineering Report, Spring Hill Water System Reliability Improvements in Norwalk, Connecticut, Dec. 2012, @ 3-3

The Comprehensive Water Distribution Systems Analysis Handbook for Engineers and Planners by Boulos, Lansey, and Karney (CWDSAHA) states, "... this storage typically varies between 25 and 35 percent of the maximum day demand. Thus, the operational storage requirements of a given zone or system are sized for a maximum day demand plus some 'insurance' value as supplied by the local agency."<sup>33</sup> This handbook is endorsed by Dr. Don J. Wood, the creator of KYPIPE Hydraulic Modeling Software.

The following table summarizes these various sources with regard to the recommended equalization factor that should be applied for equalization volume calculations.

SOURCE	Referenced Equalization Factor
AWWA Manual M 32	Greater than 30%
Walski	0.25 to 0.50
CDM Smith	15% to 30%
CWDSAHA	25% to 35%

If one were to assume the low end of the recommendation from AWWA of 0.30, then the average of all four of these recommendations is 0.30. Therefore 0.30 was selected to be used for calculation of equalization storage for the Jessamine-South Elkhorn Water District proposed tank. The calculation therefore goes as follows:

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<sup>33</sup> The Comprehensive Water Distribution Systems Analysis Handbook for Engineers and Planners by Boulos, Lansey, and Karney @ 7-34

#### Calculation of Equalization Storage

$$ES = MDD \times 0.30 = 1,784,250 \times 0.30 = \underline{535,275 \text{ gallons}}$$

where,

ES = Equalization Storage (gallons)

MDD = Maximum Day Demand: 1,784,250 gallons  
(July 6, 2010)

**Fire Storage** – “A major purpose of distribution system storage is to meet fire demands. Although fire demand may not occur often, the rate of water use is usually much greater than for domestic peak demands. Water systems are usually designed to meet fire demand in addition to normal customer needs. Fire demand can account for as much as 50% of the total capacity of a storage system.”<sup>34</sup> “Fire flow is usually the second factor to consider when determining tank capacity. Insurance Underwriters have developed formulas to determine desirable quantities, pressures, and flow durations. Using these formulas, all classes and uses of all buildings within the area served are considered. Frequently, storage requirements for fire flow are greater than the storage required for system regulation,”<sup>35</sup> “The system shall be designed and constructed to be capable of delivering the maximum-day demand and fire flow for individual and public fire requirements.”<sup>36</sup> Also the Ten States

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<sup>34</sup> Water Transmission and Distribution, Fourth Edition, ASSA @ 48

<sup>35</sup> Steel Water Storage Tanks, M-42, Revised Edition, AWWA @ 58

<sup>36</sup> Distribution Systems Operation and Management, AWWA Standard @ 11