

THOMAS A. MARSHALL
ATTORNEY AT LAW

P.O. Box 223
Frankfort, Kentucky 40602

212 Washington Street
Telephone: (502) 223-4723
marshall@mis.net

April 28, 2006

via hand-delivery

Hon. Beth O'Donnell
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, KY 40601

RE: Jeffrey C. Quarles v. Peaks Mill Water District
Post Hearing Memorandum For Defendant
Case No. 2005-00437

RECEIVED

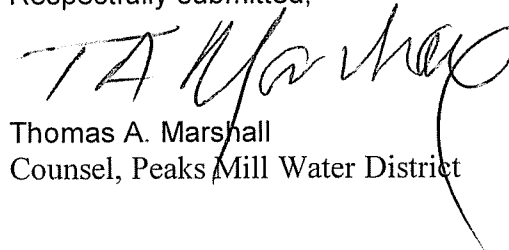
APR 28 2006

PUBLIC SERVICE
COMMISSION

Dear Ms. O'Donnell,

Peaks Mill Water District herewith files, in the above-captioned case, its original Post Hearing Memorandum and 10 copies. This filing is in regards to the Commission's Thank you for your attention to this matter.

Respectfully submitted,



Thomas A. Marshall
Counsel, Peaks Mill Water District

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

APR 28 2006

PUBLIC SERVICE
COMMISSION

In the Matter of:

JEFFREY CHARLES QUARLES)
)
COMPLAINANT)
)
V.)
)
PEAKS MILL WATER DISTRICT)
)
DEFENDANT)

CASE NO. 2005-00437

POST HEARING MEMORANUM FOR DEFENDANT

Comes the Defendant, Peaks Mill Water District, by counsel, and pursuant to the directive presented at the close of the hearing in the above-styled matter, the following Post-Hearing Memorandum is submitted for consideration.

1. PREFACE

Peaks Mill Water District (“Peaks Mill”) was created by the Franklin County Fiscal Court. Peaks Mill is subject to the provisions of KRS Chapter 74, and to the regulatory authority vested in the Kentucky Public Service Commission (“Commission”) by the statutes enacted by the Kentucky General Assembly.

Jeffery C. Quarles (“Mr. Quarles”) resides in Owen County, Kentucky. Mr. Quarles has filed a complaint with the Commission in regards to Peaks Mill’s denial of his request that Peaks Mill provided water to his property by connecting to a portion of a Peaks Mill water transmission line at a point in Owen County. The transmission line crosses a small portion of Owen County, approximately 700 feet, in order to connect to a Kentucky American Water Company (“Kentucky American”) transmission line in Owen

County. The Peaks Mill transmission line runs along US 127 North, a roadway that in the vicinity of Mr. Quarles' property.

The transmission line was installed after and in accordance with a Commission Order in Case No. 2003-00127 as a cost effective means of providing appropriate pressure levels to customers in the vicinity of northern Franklin County. As was made part of the record in Case No. 2003-00127, after acquiring the assets of Tri-Village Water District, Kentucky American extended service along U S 127 N toward the Franklin County line. Kentucky American now provides service in the vicinity of Mr. Quarles' property.

Mr. Quarles currently has service from Peaks Mill. His service is through a line that he installed from his house to a Peaks Mill meter located in Franklin County. This arrangement was entered into at a time prior to Kentucky American's extension of service into the area. During the same period, Peaks Mill also allowed one of Mr. Quarles' neighbors in Owen County, Mr. Horace Luther, to connect to a meter in Franklin County.

Peaks Mill has advised Mr. Quarles that it does not believe that it is appropriate for it to comply with his request for a connection in Owen County. The reasons were given to Mr. Quarles by letter, which he provided to the Commission with his complaint. Peaks Mill stated that water is available from Kentucky American, and that Peaks Mill is also not able to comply with his request due to territorial restrictions.

II. PROCEDURAL BACKGROUND

After the complaint was filed, Peaks Mill moved to have this matter dismissed. The motion was granted as to that portion of the complaint that asked that Peaks Mill be

required to transfer its transmission line to Kentucky American. However, the Commission denied that portion of the motion stating that Peaks Mill is not required to provide service outside of its territory, and specifically citing KRS 74.115. The Commission issued an Order denying Peaks Mill's motion on the grounds that it is already serving within Owen County (from a meter in Franklin County), and that the Commission in Case No. 2003-00127 ordered Peaks Mill to serve a Franklin County customer's rental unit located in Owen County. The order contained no discussion regarding the rationale for ordering the service than to reference a service contract.

At the beginning of the hearing in this matter, Peaks Mill renewed its motion to dismiss. After the testimony of the complainant, Peaks Mill again renewed its Motion To Dismiss, and asked the hearing officer to also consider that the matter is premature in that there is no evidence that additional water service is needed at this time.

Since the time of the hearing, on April 11th, the Commission has entered an Order denying Peaks Mill's petition for rehearing or reconsideration in regards to the first Motion to Dismiss. This was done with within six days of the hearing and specifically stated as follows: "Based upon the facts developed at that hearing and considering the record, we find that Peaks Mill's motion for reconsideration should be denied."

Counsel is perplexed as to how the Commission could have considered the facts developed at the time of the hearing and issue an order within a few days of the hearing. This action seems totally without basis, and appears to bypass the hearing officer. Additionally, anyone reviewing the last minutes of the video record would have concluded that the hearing officer intended to consider the facts and law related to the

fundamental issue: whether a district can be ordered to serve outside of its boundaries in contravention of KRS 74.115 and the ancillary provisions of KRS 74.110.

Counsel for Peaks Mill believes that it is still appropriate for the hearing officer to consider and issue a report upon the facts developed at the hearing and to consider and advise as to the legal issues associated therewith.

II. SERVICE OUTSIDE TERRITORIAL BOUNDARY

Peaks Mill has stated that it has served two customers outside of its boundary, including Mr. Quarles, from meters set in Franklin County and via service lines extended by the customers to the aforementioned meters. While well intentioned, this may have been a misinterpretation of the law by the commissioners, but it is clear that Peaks Mill understood that there were limits on the ability to extend service to individuals in Owen County. The record of the hearing reflects that Kentucky American had not yet extended service into the vicinity of the Quarles property when Peaks Mill allowed the connection by Mr. Quarles. Subsequently, Peaks Mill refused to install service to a customer in Owen County, across the highway from Mr. Quarles. Linda Bridwell, engineer in charge for Kentucky American, testified that Kentucky American now serves that location, and has since November 2003. This is the same customer and location upon which the Commission, in part, based its denial of Peaks Mill's motion to dismiss. Peaks Mill has and is seeking to avoid serving Owen County customers from Peaks Mill facilities within Owen County territory. Peaks Mill now understands that KRS Chapter 74 has specific limitations on provision of service, and is attempting to avoid compounding any past error that it may have made in an attempt to assist people who had no other entity which could deliver treated water via waterline. The Commission should not and is without

authority to order Peaks Mill to take actions in violation of the organic statute for water districts, KRS Chapter 74.

III. APPLICABLE LAW RE TERRITORIAL LIMITATIONS

The law relating to whether Mr. Quarles is entitled to have the Commission direct that Peaks Mill shall provide service in the manner he has demanded is as follows:

1. The determination of the question turns on the extent of powers and the manner of exercise, as delegated by the legislative act. *Olson et al. v. Preston St. Water Dist. No. 1 et al.*, 163 S.W.2d 307 (1942) In this case, the court applied the statute applicable to territorial boundary restrictions. The same statute which was the predecessor to KRS 74.110 and 74.115. The court specifically stated as follows:

To throw the door open to the extent here advocated, would permit such districts to extend operations far beyond the intended limits. That there was in the mind of the enacting body a decided limitation is made clear by Section 938g-3, which provides the only method by which the territorial limits of the established district may be enlarged.

2. KRS 74.110 and KRS 74.115 specifically state the manner in which a water district may enlarge its territory and extend into another county. These legislative enactments require that a district which desires to extend into another county to file a petition with the county-judge/executive. Notice and hearing on the petition are required by sections (2) and (3) of KRS 74.110 wherein it is provided as follows:

(2) Notice of the petition shall be given. Within thirty days (30) after the notice, any resident of the water district or territory proposed to be annexed may file objections and exceptions.

(3) The county judge/executive shall set the matter for hearing, and if the county judge/executive finds that it is necessary, he shall enter an order annexing or striking off the proposed territory. If the county judge/executive finds that the proposed change is unnecessary, he shall dismiss the petition. Either party may appeal the order to the Circuit Court.

3. When the words of the statute are clear and unambiguous and express the legislative intent, there is no room for construction or interpretation and the statute must be given its effect as written. *Lincoln County Fiscal Court v. Department of Public Advocacy Commonwealth of Kentucky*, 794 S.W.2d 162, 163 (1990)
4. An erroneous interpretation of the law will not be perpetuated. *Delta Air Lines, Inc. v. Commonwealth of Kentucky, Revenue Cabinet* 689 S.W.2d 14, 18 (1985)
5. The failure of the executive branch to enforce a law does not result in its modification or repeal, even though there has been long continued disregard of a statute. *Russman v. Luckett*, 391 S.W.2d 694 (1965).
6. *Louisville Extension Water Dist. Et. Al. v. Diehl Pump & Supply Co., Inc.*, 246 S.W.2d 585, 586, states that the only powers such a corporation has arise from the laws creating it, and the municipality cannot be bound by the contracts of its officers which they have no power to make...”

IV. UNREASONABLE REQUEST FOR SERVICE

Kentucky American appeared at the hearing and testimony was given that it would serve Mr. Quarles, if he made application and met their terms and conditions. It was said that he would have to acquire the necessary property or rights thereto so as to have a place for a meter or to extend a line. It was stated that he would be treated no differently than any other person making application for service.

Mr. Quarles was not able to produce any evidence showing that he is actively pursuing construction of homes or other units requiring additional water service. At this time there is no definite time for the need for additional water service. There was

testimony from Peaks Mill's engineer about the problems and expense associated with lines that are constructed, but then have no or limited water usage along the line. He said that such a line would require flushing and the expense associated with such maintenance would be more than six dollars per gallon.

Mr. Quarles testified that his current service line is sufficient for his current personal purposes. Additionally, he testified in regards to a second line that he installed to Peaks Mill meters in Franklin County, and that this line could be used, if necessary. Of course, this scenario imposes the questions posed by the discussion of service outside of territorial boundaries, as appears above.

Mr. Quarles contends that if a connection is made to Peaks Mill's transmission line, that the connection should only be made by laying a line along and over a culvert so as to avoid the necessity of laying the line down and through the creek, as was supported by both the engineer for Peaks Mill and the engineer for Kentucky American. Both engineers expressed concern about the amount of material in which the line would be buried, and that the method preferred by Mr. Quarles would not meet the usual and necessary requirements.

In this instance it is unreasonable for the Commission to order a Peaks Mill to extend into Owen County for the purpose of increasing the value of the speculative property. Mr. Quarles and his brother made numerous references to the value of a water line would add to property that may be developed at some future time.

V. LEGAL REQUIREMENT RE REASONABLENESS OF REQUEST

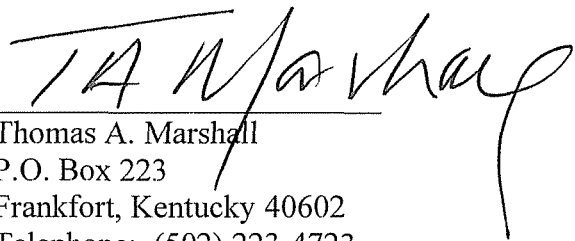
KRS 278.280 (3) states, in part, that "The Commission shall hear and determine the reasonableness of the extension, and sustain or deny the petition in whole or in part."

Further, given the facts stated above, Peaks Mill contends that the petition is not ripe for consideration, and thus does not meet the reasonableness test. At this time, there is no need for the Commission to enter an order deciding the reasonableness of a petition based upon speculation about a future event or circumstance that may never exist. There complainant has not met his burden of proof of showing by substantial evidence that Peaks Mill should be ordered to provide service at this time from a connection in Owen County.

CONCLUSION

The complainant's requested relief must be denied. The Commission cannot overrule and make void the requirements of KRS Chapter 74.110 as to how a district may extend into another county. Additionally, the Complaint must be denied as it is an unreasonable request given the current circumstances.

Respectfully submitted,



Thomas A. Marshall
P.O. Box 223
Frankfort, Kentucky 40602
Telephone: (502) 223-4723
Facsimile: (502) 223-0001

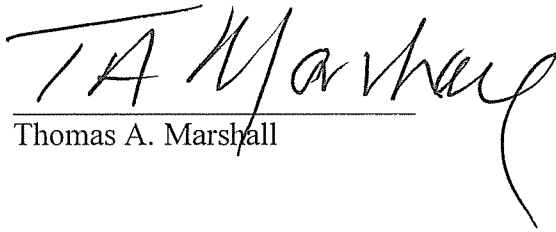
Counsel to Peaks Mill
Water District

CERTIFICATE OF SERVICE

I hereby certify that, on April 28th, 2006, a complete and accurate copy of the foregoing was sent by First Class Mail, postage prepaid, to:

Jeffrey C. Quarles
15480 Owenton Road
Frankfort, Kentucky, 40601

James R. Goff, Esq.
Kentucky Public Service Commission
211 Sower Blvd.
Frankfort, KY 40601



Thomas A. Marshall