

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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In the Matter of:

The Joint Application of Sandy Valley)
Water District, Southern Water and) Case No. 2006-00327
Sewer District and the city of Pikeville)
for approval of the transfer of facilities)
and for the assumption of debt by Southern)
Water and Sewer District)

RESPONSE TO PRESTONSBURG MOTION FOR INTERVENTION

Sandy Valley Water District (Sandy Valley), Southern Water and Sewer District (Southern) and the city of Pikeville (Pikeville), joint applicants, by counsel, object to the intervention of Prestonsburg as being untimely.

807 KAR 5:001§ 3(8) requires any application for intervention to be “timely. The application in this case was filed on June 29, 2006. The final order was issued on January 22, 2007. The motion for intervention was filed on April 17, 2007. Prestonsburg had six months to attempt to intervene during the pendency of the application. It chose not to do so. Its attempt to interfere with the Commission’s decision some four months after the final order should be denied.

The decision not to intervene was exclusively in the hands of Prestonsburg. It had notice of the application and it had the opportunity to attempt to intervene, but did not. Its belated effort now should be rejected just as the Commission has done with similarly late filed motions for intervention. For example, in “East Kentucky Power Cooperatives

Request for a Declaratory Ruling”, Case No. 2004-00430, the Commission rejected an intervention motion filed after the issuance of the final order. The Commission said:

Despite the significant interest which it alleges to have in the subject matter of this proceeding, Salt River took no action to intervene until the issuance of the final order. Consistent with previous Commission rulings involving similar factual situations, we find Salt River’s motion untimely and should be denied.

As the facts discussed in this Response will show, Prestonsburg had both notice and opportunity to timely intervene. It chose not to do so. Prestonsburg intervened in the case of “The city of Pikeville and Mountain Water District for Transfer of Certain Wastewater Facilities and Related Debt, Case No. 2006-00123.” After several pleadings that addressed issues not relevant to that case, Prestonsburg withdrew its intervention, but indicated that it might have an interest in the application that was ultimately filed in this proceeding. It indicated that it reserved the right to intervene if appropriate. Prestonsburg not only was aware of the pending matters involved in this case, it acknowledged in a prior pleading its potential for intervention. Yet, with full notice and awareness of the issues in this proceeding it did not attempt to intervene until a few days ago.

Prestonsburg’s Motion recites several factors allegedly supporting its “interest” in this case. Many of those factors relate to wastewater issues, yet Prestonsburg’s only stated interest is in a wholesale water contract with Sandy Valley Water District. Its references to the wastewater matters involving Southern Water and Sewer District and the city of Pikeville are not relevant to its attempted intervention.

In an unexplainable allegation, Prestonsburg says that Pikeville has not requested Commission approval to assume operations of certain of Sandy Valley’s assets. The application in this case specifically refers to Pikeville as an applicant. There is a detailed

discussion of the transaction among Pikeville and Sandy Valley in the Application of this case, including the Interlocal Agreement executed by Pikeville, Southern and Sandy Valley. That Agreement specifically contains a provision for Pikeville's interim operation of Sandy Valley. The final order in this case directly addresses the transfer of Sandy Valley's assets and operation to Pikeville. All necessary approvals were requested of and granted by the Commission in the final order of January 22, 2007.

Prestonsburg alleges in paragraph 9 of the Motion that it "believed" certain issues related to a possible assignment of its wholesale water contract "had been resolved." Consequently, based on that "belief" Prestonsburg apparently decided to forego timely intervention in this case. No support for this "belief" is provided. However, there is certainly nothing in the record of this case to support such a belief. The Application filed by Pikeville, Sandy Valley and Southern recites the specific elements of the transaction. It does not include any reference to the assumption of the Prestonsburg water contract by Southern. Any water contract entered into or agreed to by Southern would require Commission approval. No contract was included in the Application for such approval. The lack of the contract in the Application was Prestonsburg's first opportunity to learn that its belief was not justified.

The second opportunity for Prestonsburg to learn of the lack of inclusion of the contract in this case was in the Response dated November 28, 2006. Item 4 includes minutes of Southern's Board of Commissioners. The minutes for April 24, 2006 has a lengthy discussion of the Sandy Valley contract, its assignment and a motion to rescind the District's prior decision to accept an assignment of the Sandy Valley water contract.

Additionally, Item 6 of that response states in part:

Reduction in purchased water expense, given the fact that Southern Water plans to either provide the necessary water for Sandy Valley Water customers from its own system, or purchase any additional water needed from the City of Pikeville, **eliminating the higher cost of water from the City of Prestonsburg.**

Assuming that Prestonsburg was monitoring this case, as it indicated it would when it withdrew from Case 2006-00123, it would have been aware of the wholesale contract status in the proposed transaction among Sandy Valley and Southern. It apparently either did not investigate the issue as it was presented in the case or it chose not to pursue the matter. In either event, it was Prestonsburg's discretion not to act in a timely manner.

There is a "Consent to Assignment" of Prestonsburg dated August 21, 2006 attached to the Motion to Intervene. Its purpose is apparently to support the notion that the Sandy Valley contract had been or would be assigned to Southern. However, at the time of the signing of that Consent, Prestonsburg knew or had the opportunity to know that no assignment had been executed by Southern. In fact, the action of Southern's Board of Commissioners in April, 2006 specifically rejected such an assignment. That meeting was open to the public and Prestonsburg could have or should have been aware of Southern's actions. This case was filed in June, 2006, with no mention of an assignment. So any belief by Prestonsburg of the assignment of the Sandy Valley contract came from sources other than Southern. Because Sandy Valley and Pikeville were joint applicants with Southern, the information about an assignment could not have come from them. All information about an assignment that is publicly known refute Prestonsburg's alleged "belief" about an assignment.

Interestingly, in its “Reply to Joint Petitioners Response to Motion to Intervene of the City of Prestonsburg” in Case 2006-00123, filed April 20, 2006, Prestonsburg stated on page 3 that the execution of the Interlocal Agreement dated January 1, 2006, caused Sandy Valley to breach the contract with Prestonsburg:

Sandy Valley is in breach of paragraph 21 of said Water Contract since paragraph 21 prohibits Sandy Valley from taking any action ‘...so as to make Prestonsburg [Movant herein], directly or indirectly, a wholesale supplier to any other water system, without Prestonsburg’s consent.’ The Interlocal Agreement was entered into by Sandy Valley without the knowledge or consent of Movant. **Subsequent to the execution of the Interlocal Agreement, the parties to the Interlocal Agreement have requested Movant to give its consent, which Movant has refused to do.**

Based on the record of this case, from January 1, 2006 until August 21, 2006, Prestonsburg refused to consent to the assignment of the Sandy Valley contract. Apparently, Prestonsburg was willing to consent to the assignment only after it knew Southern had rejected that option.

Prestonsburg alleges on page 4 of its Motion that Southern gave notice of its intent not to honor the terms of the water contract after the transfer of Sandy Valley’s assets to Southern. Obviously, there was never an intention by Southern to assume that contract and notice of such was frequent and public. Prestonsburg’s corollary allegation says in paragraph 12 that Southern has illegally terminated the Sandy Valley water contract. Southern is not a party to that contract, so it cannot terminate it.

Obviously, Prestonsburg was aware at the time of the execution of the Interlocal Agreement, dated January 1, 2006 that the water contract was an issue and that it had an interest in the determination of the fate of that contract. It is also apparent that

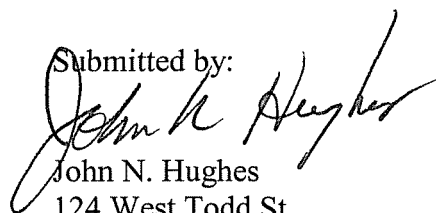
Prestonsburg's refusal to consent to Sandy Valley's potential assignment of the contract undermines its claim that it expected an assignment to be executed.

Based on these facts, Prestonsburg had full knowledge at the time of the filing of the Application in this case not only of the issues in the case, but of the specific lack of any reference to an assignment of its contract or a request by Southern for approval to enter into a contract with Prestonsburg. Because Prestonsburg had notice of the specific issue it now raises prior to the filing of the Application in this case and the opportunity to timely intervene, it should not be allowed to intervene at this time.

Prestonsburg also requests a temporary restraining order to prevent the transfer of the assets among the Joint Applicants. The Commission has no authority to issue the injunctive relief sought by Prestonsburg. See for example, "Americoal Coal Corporation vs. Boone County Water and Sewer District and An Investigation of Boone County Water and Sewer District", Case Nos. 90-108 and 91-220: "KRS Chapter 278 does not confer injunctive powers upon the Commission. (Fn 1)."

The allegations of Prestonsburg do not state a special interest that supports its intervention, its motion is untimely and the relief sought is beyond the scope of the Commission's authority. For these reasons, the Motion to Intervene should be denied.

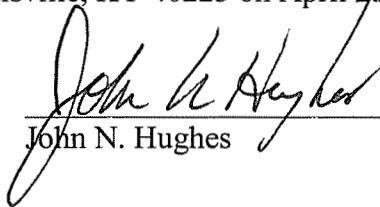
Submitted by:



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Certificate:

I certify that a copy of this Motion was served on the Attorney General and on Kipley McNally, 2527 Nelson Miller Parkway # 104, Louisville, KY 40223 on April 25th, 2007 by first class mail.



John N. Hughes