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October 20, 2011

Mr. Jeff R. Derouen, Executive Director  
Kentucky Public Service Commission  
211 Sower Boulevard  
P. O. Box 615  
Frankfort, Kentucky 40602-0615

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OCT 20 2011

PUBLIC SERVICE  
COMMISSION

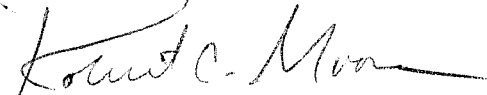
Re: Forest Creek vs. Jessamine - South Elkhorn Water District,  
Public Service Commission Case No. 2011-00297

Dear Executive Director Derouen:

Please find enclosed the original and ten (10) copies of Forest Creek's Response to Motion to Dismiss.

Please contact me if you would like to discuss this matter, or need any further information concerning same.

Respectfully,



Robert C. Moore

RCM/neb

cc: James Kelley  
Gerald Wuetcher

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the matter of:

FOREST CREEK, LLC

COMPLAINANT

vs.

JESSAMINE- SOUTH ELKHORN WATER DISTRICT

DEFENDANT

Case No. 2011-00297

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COMMISSION

**FOREST CREEK'S RESPONSE TO MOTION TO DISMISS**

Comes the Complainant, Forest Creek, LLC ("Forest Creek"), by counsel, and for its response to the Motion to Dismiss submitted by the Defendant, Jessamine - South Elkhorn Water District ("Water District"), states as follows:

The Water District requests that the Public Service Commission ("the Commission") dismiss the above-styled proceeding for lack of jurisdiction. However, the applicable statutes and case law provide that the Commission has exclusive jurisdiction over Forest Creek's Complaint. KRS 278.040(2) provides:

The jurisdiction of the commission shall extend to all utilities in this state. The commission shall have exclusive jurisdiction over the regulation of rates and service of utilities, but with that exception nothing in this chapter is intended to limit or restrict the police jurisdiction, contract rights or powers of cities or political subdivisions.

Accordingly, the Commission has exclusive jurisdiction over the regulation of rates and service of utilities. See also Smith v. Southern Bell Tel. & Tel. Co., 104 S.W.2d 961, 963, 104 S.W.2d 961 (Ky.App. 1937)(The court is of the opinion that the primary jurisdiction and authority to fix

rates, establish reasonable regulation of service, and to alter and make changes to said regulations and to make investigation as to any change in service as is sought by appellant in the case at bar, is exclusively and primarily in the commission). Of course, pursuant to the relevant language of KRS 278.015, a water district is a utility subject to the jurisdiction of the Commission. Therefore, the Commission has exclusive jurisdiction over the rates and service of the Water District.

There can be no doubt that the service at issue here is subject to the Commission's jurisdiction. The relevant language of KRS 278.010(13) defines service very broadly by stating, "Service' includes any practice or requirement in any way relating to the service of any utility . . ." Rule 26 of the Water District's rules and regulations provides that developers such as Forest Creek have two options to obtain water service. Option I provides that the:

District shall construct such extension under authority and procedure as stipulated in Public Service Commission regulation 807 KAR 5:066E, Section 12. Any extension made under this option shall be subject to refund as outlined in said regulation.

Option II provides that:

Applicant may construct and donate to District, the extension, as a contribution in aid of construction, meeting all District's specifications and approval. District reserves right to stipulate applicable engineering, legal and administrative factors. Applicant shall pay all costs of District as a contribution in aid of construction. Any extension made under this Option shall not be eligible for refund.

The Water District's policy further provides that "the applicant. . . shall have the right to elect the option by which said extension shall be made. In either case Applicant must execute a contract and agreement for line extensions of (sic) form approved by District." On or about April 27,

2007, Forest Creek completed forms provided to it by the Water District indicating that Forest Creek requested the Water District to provide potable water to its Development under Option II. Then, pursuant to the Water District's requirements, on May 2, 2007, Forest Creek signed the Interim Water Service Agreement with the Water District. Option I, Option II and the Interim Water Service Agreement must be signed by an applicant in order to obtain water service. Accordingly, it cannot be reasonably argued that Option I, Option II and the Interim Water Service Agreement at issue in this proceeding do not concern service as defined by KRS 278.010(13), and over which the Commission has jurisdiction.

In the last four (4) years, Forest Creek has worked diligently to comply with the requirements of Option II and asserts that it has complied with its requirements. However, the Water District has arbitrarily and capriciously prohibited Forest Creek from obtaining an extension to provide potable water to its development. (See Paragraph 6 of Forest Creek's Complaint) Because of the Water District's arbitrary and capricious acts in refusing to allow Forest Creek to obtain the required water line extension under Option II, Forest Creek filed its Complaint against the Water District and seeks an Order from the Commission allowing it to obtain the water line extension under Option I, to require the Water District to make the reasonable extension necessary to provide the requested water service, and to compel the Water District to cease its unreasonable and discriminatory acts against Forest Creek.

KRS 278.260(1) states:

The commission shall have original jurisdiction over complaints as to rates or service of any utility, and upon a complaint in writing made against any utility by any person that any rate in which the complainant is directly interested is unreasonable or unjustly discriminatory, or that any regulation, measurement, practice or act affecting or relating to the service of the utility or any service in

connection therewith is unreasonable, unsafe, insufficient or unjustly discriminatory, or that any service is inadequate or cannot be obtained, the commission shall proceed, with or without notice, to make such investigation as it deems necessary or convenient.

KRS 278.260(1) therefore clearly states that the Commission has original and exclusive jurisdiction over Forest Creek's Complaint resulting from the Water District's arbitrary and capricious acts in failing to provide it with reasonable water service.

In addition to the fact that KRS 278.260(1) provides that the Commission has original and exclusive jurisdiction to determine if the Water District has acted arbitrarily and capriciously, the Commission pointed out in its Motion to Intervene filed in the Jessamine Circuit Court that it must address the following issues in determining whether the Interim Water Service Agreement complies with its requirements:

- a. Under what conditions may [the Water District] be required to extend water service to Forest Creek's real estate development;
- b. Whether [the Water District's] Rules and Regulations prohibit an applicant for an extension of water service to a real estate development from changing its election of an option after making that election;
- c. If [the Water District's] Rules and Regulations do not prohibit an applicant for an extension of water service to a real estate development from changing its election, what time limits, if any, can reasonably be placed upon an applicant's right to change its choice;
- d. Whether [the Water District's ] actions with regard to Forest Creek's request for extension of service to its property are "unjust, unreasonable, unsafe, improper, inadequate or insufficient"; and,
- e. Whether the provisions of an agreement that sets forth conditions under which a utility will extend and provide water service are enforceable if the agreement is not filed with the Commission.

(See Commission's Motion to Intervene in Jessamine Circuit Court, Civil Action No. 10-CI-

01394, pp. 4 & 5). These are issues that must be addressed to determine if Option II and the Interim Water Service Agreement complies with the requirements of the Commission. Should the Commission determine that Option II and the Interim Water Service Agreement do not comply with its requirements, they are not enforceable.

The Water District appears to claim that the sole issue is the interpretation of the Interim Water Service Agreement and that matters of contract interpretation are well within a court's expertise. However, as set forth above, this case primarily involves the issue of whether the Water District has been arbitrary and capricious in its treatment of Forest Creek by prohibiting it from obtaining its requested water extension and also whether the provisions of Option II and the Interim Water Service Agreement comply with the Commission's requirements. The Water District also appears to argue that it is a political subdivision and therefore the Commission does not have jurisdiction over Forest Creek's Complaint. Once again, the Water District's arguments miss the mark, as the relevant language of KRS 278.015 provides that any water district "shall be a public utility and shall be subject to the jurisdiction of the Public Service Commission in the same manner and to the same extent as any other utility as defined in KRS 278.010 . . . ." Indeed, in Simpson County Water District v. City of Franklin, 872 S.W.2d 460, 464 (Ky. 1994), the Court stated, "the legislature, by its amendment of KRS 278.010(3), brought water districts within the PSC's jurisdiction".

In support of its Motion to Dismiss, the Water District cites language in Simpson County providing that were contract interpretation "the sole issue, we would state that matters of contract interpretation are well within the court's expertise and not that of utility regulatory agencies". Id. at 464. Because contract interpretation was not the sole issue in Simpson County, the court held

that the Commission had exclusive jurisdiction. Similar to the Simpson County case, as set forth above, this case involves more than just a contract interpretation issue. It involves the Water District's arbitrary and capricious acts over the last four (4) years prohibiting Forest Creek from obtaining water service and also whether Options I and II and the Water District's Interim Water Service Agreement complies with the requirements of the Commission. The Commission's decision in this case may also have an affect on the rates to be charged the Water District's customers. Therefore, Simpson County, the primary case relied upon by the Water District, further establishes that the Commission has exclusive jurisdiction over this case.

The Water District also attempts to rely on Bee's Old Reliable Shows, Inc. v. Kentucky Power Co., 334 S.W.2d 765, 767 (Ky. 1960), in arguing that if a circuit court action does not involve rates for regular service charged to the public generally, jurisdiction is not exclusive to the Commission. In making this argument, the Water District relies upon the language in Bee's stating:

Although the Public Service Commission has jurisdiction over questions concerning rates and services generally, nevertheless, when a question arises which is peculiar to the individual complainant, the courts will assume jurisdiction and hear the matter. Here no question is raised concerning rates charged for regular service.

Id. at 767. When Bee's was decided, KRS 278.260 required at least ten (10) patrons, rather than a single person, to make a complaint before the Commission was authorized to conduct an investigation. The relevant language of KRS 278.260 has since been amended to state that the Commission:

[S]hall have original jurisdiction over complaints as to rates or service of any utility, and upon a complaint in writing made against any utility by any person . . .

that any regulation, measurement, practice or act affecting or relating to the service of the utility or any service in connection therewith is unreasonable, unsafe, insufficient or unjustly discriminatory, or that any service is inadequate or cannot be obtained, the commission shall proceed, with or without notice, to make such investigation as it deems necessary or convenient. (Emphasis added)

Therefore, because KRS 278.260 now provides for the Commission to investigate complaints made by a single person or entity concerning a utility's service, the holding in Bee's no longer supports the Water District's position and the above cited statutes and case law clearly establish that the Commission has exclusive jurisdiction over this matter.

Finally, the Water District cites the unpublished decision issued in Christian County Water District v. Hopkinsville Sewage and Water Works Commission, 2009-CA-001543-MR (KYCA), a case involving a contract dispute over the failure to transfer the service territory of the water district. The court held that the circuit court had jurisdiction over this contract dispute because:

[E]stablishment of water district territories is governed by KRS 74.110. It provides that territory changes are subject to approval by the county judge executive and appealable to the circuit court. It does not incorporate by reference any involvement by the PSC.

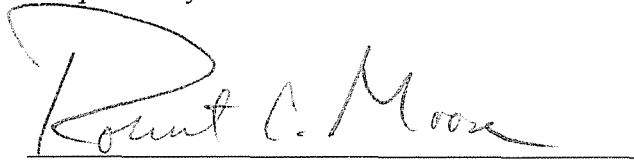
Id. at 4. Unlike the facts in Christian County, this proceeding does not concern the change of water district territory. Therefore, the decision in Christian County does not support the Water District's claim.

In conclusion, Forest Creek's Complaint concerns service that is being provided to it by the Water District, a utility subject to the Commission's jurisdiction by statute, and its Complaint is therefore subject to the exclusive jurisdiction of the Commission. Furthermore, the issues to be determined in the proceeding before the Commission are subject to its exclusive and original



jurisdiction. Therefore, the Water District's Motion to Dismiss Forest Creek's Complaint for lack of Jurisdiction must be denied.

Respectfully submitted,



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Frankfort, KY 40602-0676  
Counsel for Forest Creek, LLP

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing was served by first class mail, postage prepaid, this the \_\_ day of October, 2011, to, Hon. Bruce E. Smith, **BRUCE E. SMITH LAW OFFICES, PLLC**, 201 South Main Street, Nicholasville, Kentucky 40356.



Robert C. Moore