

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF CITIZENS NATIONAL BANK OF)	
SOMERSET, KENTUCKY FOR AN ORDER)	CASE NO. 2011-00302
APPROVING A TRANSFER OF OWNERSHIP AND)	
CONTROL)	

ORDER

Citizens National Bank of Somerset, Kentucky has applied for Commission approval of its acquisition of certain sewage collection and treatment facilities that are located in Pulaski County, Kentucky, or, in the alternative, for a declaration that Commission approval of its acquisition is not required and for a Certificate of Public Convenience and Necessity to provide sewage collection and treatment services.

Having reviewed the evidence of record and being otherwise sufficiently advised, the Commission finds:¹

1. Citizens Bancshares, Inc., a Kentucky corporation organized pursuant to KRS Chapter 271B,² is a nationally chartered bank³ that is headquartered in Pulaski

¹ Citizens National tendered its application for filing on August 17, 2011. Finding that the application did not comply with 807 KAR 5:001, the Executive Director initially rejected the filing, but accepted the filing on September 22, 2011 after Citizens National supplemented its application. No persons have sought intervention in this proceeding. Commission Staff has conducted discovery in this matter. Citizens National has not requested a hearing in this matter. To ensure a complete and thorough record upon which to consider Citizens National's application, we have by this Order incorporated the record of an earlier proceeding involving the facilities that Citizens National seeks to acquire.

² See [https://app.sos.ky.gov/ftshow/\(S\(5yumvziro053a453bt3zw25\)\)/default.aspx?path=ftsearch&id=0083393&ct=09&cs=99999](https://app.sos.ky.gov/ftshow/(S(5yumvziro053a453bt3zw25))/default.aspx?path=ftsearch&id=0083393&ct=09&cs=99999) (last visited Jan. 19, 2012).

³ See <http://www.occ.treas.gov/topics/licensing/national-bank-lists/national-by-name-v2.pdf> (last visited Jan. 19, 2012).

County, Kentucky. It operates as Citizens National Bank of Somerset, Kentucky (“Citizens National”).

2. South Fork Development, Inc. (“South Fork”) is a Kentucky corporation incorporated in 1994 under the provisions of KRS Chapter 271B for the purpose of real property development.⁴

3. Since December 7, 2000, South Fork has operated under the name of “The Villas at Woodson Bend.”⁵

4. On April 1, 2002, South Fork filed a Master Deed with the Pulaski County Clerk’s Office establishing a condominium property regime and designating a 48-acre tract of land as “The Villas at Woodson Bend.”

5. On July 25, 2001, the Kentucky Division of Water (“DOW”) granted authorization to South Fork to operate for five years a no-discharge waste treatment system on property that adjoined the condominium development and that the Janice Gross Living Revocable Trust owned.⁶

6. South Fork’s system consisted of two aerated treatment lagoons and one polishing, evapo-transpiration pond and had a design treatment capacity of 65 residential units.⁷

⁴ Articles of Incorporation of South Fork Development, Inc. at 1 (Sep. 19, 1994), <https://app.sos.ky.gov/corpscans/57/0335957-09-99999-19940919-ART-2242144-PU.pdf> (last visited Jan. 19, 2012).

⁵ Certificate of Assumed Name (Dec. 7, 2000), [https://app.sos.ky.gov/ftshow/\(S\(4krm2rjcvxdbdfa5qpnsvn2r\)\)/genpdf.aspx?ctr=1222842](https://app.sos.ky.gov/ftshow/(S(4krm2rjcvxdbdfa5qpnsvn2r))/genpdf.aspx?ctr=1222842) (last visited Jan. 19, 2012).

⁶ Letter from Jack A. Wilson, Director, Kentucky Division of Water, to Timothy L. Gross, South Fork Development (July 25, 2001) (filed on May 29, 2009 in PSC Case No. 2009-00037); Defendants’ Responses to Request for Information, Item 2 (filed on May 29, 2009 in PSC Case No. 2009-00037).

⁷ Letter from David S. Pyzoha, Principal, Evans, Mechwart, Hambleton & Tilton, Inc., to Tina Bailey, Kentucky Division of Water (Aug. 10, 2006) (filed on May 29, 2009 in PSC Case No. 2009-00037).

7. Construction of South Fork's no-discharge waste treatment system was completed as of 2004.⁸

8. In 2006, DOW approved South Fork's application to construct a collection system consisting of 6,151 linear feet of 8-inch polyvinylchloride sewer main to connect the condominium development to the wastewater treatment system.⁹

9. The Master Deed for the condominium property stated that the sewage collection and treatment system was not part of the common elements, but further provided that the cost of operating the facilities was a common expense to be paid from regular assessments of all condominium unit owners.¹⁰

10. South Fork developed the sewage collection and treatment facilities to provide sewage services to the unit owners at The Villas at Woodson Bend.¹¹

11. Unit owners paid a monthly assessment to The Villas at Woodson Bend Condominium Association, Inc. ("Condominium Association"), a non-profit corporation organized under KRS Chapter 273 and composed of the owners of the condominium

⁸ This finding is based upon records that show the sewage treatment plant incurring bills for electric service as of June 2004. See Defendants' Responses to Request for Information, Item 3 (filed on May 29, 2009 in PSC Case No. 2009-00037).

⁹ Letter from Harold S. Sparks, Supervisor, Facilities Construction Branch, Kentucky Division of Water, to David S. Pyzoha, Principal, Evans, Mechwart, Hambleton & Tilton, Inc. (June 22, 2006) (filed on May 29, 2009 in PSC Case No. 2009-00037).

¹⁰ Defendants' Responses to Request for Information, Item 9 (filed on May 29, 2009 in PSC Case No. 2009-00037).

¹¹ *Id.* Item 8.

units within the Villas at Woodson Bend. A portion of this monthly assessment related to the cost of electricity that the sewer collection and treatment facilities used.¹²

12. While owning the sewer collection and treatment facilities, South Fork did not issue any bills for sewer services to unit owners at The Villas at Woodson Bend or the Condominium Association.¹³

13. Beginning on or about April 24, 2002, South Fork executed a series of promissory notes to Citizens National to finance the development of the condominium property. As collateral for repayment of the original note and subsequent notes related to the condominium development, South Fork and the Janice Gross Living Revocable Trust executed an agreement that conferred a mortgage to Citizens National on real property that South Fork and the Janice Gross Living Revocable Trust owned, including the real property upon which the sewage collection and treatment facilities were located.

14. In 2008, South Fork defaulted upon its loan obligations to Citizens National.¹⁴

15. On February 18, 2009, Citizens National initiated legal action in Pulaski Circuit Court against South Fork and others to enforce the terms of promissory notes and to foreclose on mortgages that secured payment of the promissory notes.¹⁵

¹² *Id.* Article V of the Master Deed provided for the making and collection of assessments against unit owners for common expenses of the condominium project, including utility expenses related to the common elements. As the sewage collection and treatment facilities were not part of the common elements, electric power expenses for the operation of the sewage facilities do not appear to be appropriate for inclusion in any assessment made by the Condominium Association. South Fork took a contrary position. See Defendants' Responses to Request for Information, Item 9 (filed on May 29, 2009 in PSC Case No. 2009-00037).

¹³ *Id.* Items 3–6. See also Citizen National's Response to Commission Staff's First Information Request, Item 1 (filed Oct. 3, 2011).

¹⁴ Application at ¶ 6.

¹⁵ *Citizens National Bank v. Kenison*, No. 09-CI-00231 (Pulaski Cir. Ct. Ky. filed Feb. 18, 2009).

16. On November 20, 2009, Pulaski Circuit Court granted judgment against South Fork and ordered the sale of the properties that secured the debts.¹⁶

17. On April 28, 2011, a master commissioner sold the sewage collection and treatment facilities, including the wastewater treatment plant, sewer mains, manholes, force mains, pumping and lifting stations, easements, rights-of-way, licenses, privileges, improvement and appurtenances necessary to the operation of the wastewater treatment plant, to Citizens National subject to Commission approval.¹⁷

18. Citizens National proposes to operate the sewage collection and treatment facilities and to assess a fee to each unit owner for the provision of sewage collection and treatment facilities.¹⁸

19. Since the master commissioner's sale of the sewage collection and treatment facilities, Citizens National has undertaken extensive repairs to the facility, has maintained the facility, and has born all of the cost of the necessary repairs and maintenance.

20. Citizens National has retained Richard Troxell, a certified wastewater treatment plant operator, to operate the sewage collection and treatment facilities.

21. As of December 31, 2010, Citizens National had total assets of \$325,576,381 and total liabilities of \$290,413,486.¹⁹

¹⁶ *Citizens National Bank v. Kenison*, No. 09-CI-00231 (Pulaski Cir. Ct. Ky. Nov. 20, 2009).

¹⁷ *Citizens National Bank v. Kenison*, No. 09-CI-00231 (Pulaski Cir. Ct. Ky. Jun. 29, 2011).

¹⁸ Citizen National's Response to Commission Staff's First Information Request, Item 2 (filed Oct. 3, 2011).

¹⁹ Application, Exhibit C.

22. Neither the deed to the property on which the sewage facilities are located nor any agreement prohibits Citizens National's right or ability to provide sewage collection or treatment services to properties outside The Villas at Woodson Bend.

Based upon the findings set forth above, the Commission makes the following conclusions of law:

1. KRS 278.020(5) provides that "[n]o person shall acquire or transfer ownership of, or control, or the right to control, any utility under the jurisdiction of the commission . . . without prior approval by the commission."

2. KRS 278.020(6) provides that "[n]o individual, group, syndicate, general or limited partnership, association, corporation, joint stock company, trust, or other entity (an "acquirer"), whether or not organized under the laws of this state, shall acquire control, either directly or indirectly, of any utility furnishing utility service in this state, without having first obtained the approval of the commission."

3. KRS 278.010(3) defines a utility as:

[A]ny person. . . who owns, controls, operates, or manages any facility used or to be used for or in connection with. . .

. . . .

(f) [t]he collection, transmission, or treatment of sewage for the public, for compensation, if the facility is . . . a sewage collection, transmission, or treatment facility that is affixed to real property, that is located in any other county [than a county containing a city of the first class], and that is not subject to regulation by a metropolitan sewer district or any sanitation district created pursuant to KRS Chapter 220.

4. As South Fork did not provide sewage service for compensation to the individual unit owners at The Villas at Woodson Bend, South Fork is not a utility as defined in KRS 278.010(3).

5. The sale of the sewer facilities from South Fork to Citizens National does not constitute a transfer of control of a “utility.” KRS 278.020(5), therefore, does not require Commission approval of the sale.

6. Citizens National’s acquisition of South Fork’s sewer facilities does not constitute the acquisition of control of a “utility.” KRS 278.020(6), therefore, does not require Commission approval of the acquisition.

7. “One offers [service] to the ‘public’ . . . when he holds himself out as willing to serve all who apply up to the capacity of his facilities. It is immaterial . . . that his service is limited to a specified area and his facilities are limited in capacity.”²⁰

8. As set forth in its application, Citizens National intends to provide sewer collection and treatment service to the public for compensation and therefore intends to provide utility service.

9. KRS 278.020(1) provides that no private corporation “shall commence providing utility service to or for the public . . . until that person has obtained from the Public Service Commission a certificate that public convenience and necessity require the service. . . .”

10. KRS 278.020(1) requires Citizens National to obtain a Certificate of Public Convenience and Necessity prior to providing sewer service to the public for compensation.

11. Citizens National’s assumption of the ownership and operation of the South Fork sewer facilities will not result in wasteful duplication of services or facilities.

²⁰ *North Carolina ex rel. Utilities Comm’n v. Carolina Tel. & Tel. Co.*, 148 S.E.2d 100, 109 (N.C. 1966). See also Case No. 94-066, *South Williamson Lodging, Inc. v. Little Pearl Trucking Co., Inc.*, (Ky. PSC Jul. 10, 1996) (sale of utility services to persons purchasing a real estate interest in a development is considered offering service to “the public”).

12. The public convenience and necessity require Citizens National's assumption of the ownership and operation of the South Fork sewer facilities.

IT IS THEREFORE ORDERED that:

1. The record of Case No. 2009-00037²¹ is incorporated by reference into the record of this proceeding.

2. Citizens National's application for Commission approval of the acquisition of the South Fork sewer facilities is denied as moot.

3. Citizens National is granted a Certificate of Public Convenience and Necessity to provide sewer service to the Villas at Woodson Bend.

4. Citizens National shall not begin providing sewer service for compensation until its rates for service have been filed with and approved by the Commission.

By the Commission

ENTERED <i>PA</i>
JAN 20 2012
KENTUCKY PUBLIC SERVICE COMMISSION

ATTEST:

Stephan Bee for Jeff Deen
Executive Director

²¹ Case No. 2009-00037, *The Villas at Woodson Bend Condominium Association v. South Folk Development, Inc.* (Ky. PSC filed Jan. 30, 2009).

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