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To: Filing @ PSC

Fax Number: (502) 564 3460 Date: 6.4.2010

Number of pages including cover sheet: 7

Message: Case # 2009-00264

Attached for filing - Defendant's  
Reply to Complainant's Response to motion  
to Dismiss -

Original is being placed in US mail  
today.

Thank you,  
Glenna J. Curry  
Counsel for Defendant

From: \_\_\_\_\_

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COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

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JUN 04 2010

PUBLIC SERVICE COMMISSION

IN THE MATTER OF

JAMES S. WAYNE, INDIVIDUALLY AND AS )  
TRUSTEE OF THE JAMES S. WAYNE )  
LIVING TRUST )

COMPLAINANTS )

VS )

HENRY COUNTY WATER DISTRICT #2 )

DEFENDANT )

CASE NO. 2009-00264.

**REPLY TO COMPLAINANTS' RESPONSE TO MOTION TO DISMISS**

Comes the above-named Defendant, by counsel, and for its REPLY TO COMPLAINANTS' RESPONSE TO MOTION TO DISMISS, respectfully states as follows:

Complainants' "Response to Motion to Dismiss" was filed herein on May 26, 2010. Pursuant to the procedural schedule set forth in the Intra-Agency Memorandum dated March 24, 2010, this Reply is being filed within ten (10) days thereafter.

**I. THE DEFENDANT HAS NOT VIOLATED THE PSC'S REGULATION, 807 KAR 5:066 SECTION 12.**

Complainants argue that the Henry Water District violated 807 KAR 5:066, Section 12 by failing to incur the expense of constructing the disputed line. This is the first instance this argument has been raised by Complainants, as the asserted violation of regulation was not pled in the Complaint. As noted in the Intra-Agency Memorandum, the Henry Water District improved, and has maintained, the water line since acquiring the easement from Mr. Congleton. Obviously, if no water line had been in existence, the water district would have had to construct a new line

to service the customers on McCarty Lane, and recoup the expense of this construction from its customers.

**II. THE CASES RELIED UPON BY COMPLAINANTS DO NOT HOLD THAT THE PSC HAS BEEN GRANTED LEGISLATIVE AUTHORITY TO MAKE REAL PROPERTY OWNERSHIP DETERMINATIONS, OR TO VALUE REAL PROPERTY FOR PURPOSES OF MAKING "JUST COMPENSATION."**

In the Statement of Facts of the Complainants' Response to Defendant's Motion to Dismiss, Complainants assert that "the purchase price of the Farm included a one-mile long private line ("Wayne water line".) This water line lies on the real property owned by Larry Congleton, and was conveyed to the Henry County Water District by easement of record. Complainants' Complaint and request for relief (i.e., determination that the Wayne Trust is the "sole owner" of the "Wayne water line") inherently require the PSC to make a determination of real property ownership based on a legal interpretation of the relevant property conveyances. It is undisputed that Larry Congleton is the legal owner of the real property on which the water line lies. The Wayne Trust claims ownership of the water line by virtue of their deed to the Davis property, a deed noticeably silent on the matter of the 3" water line. The Wayne Trust has no easement for the water line. The Henry District has a recorded easement entitling them to enter the Congleton property for purposes of providing water service. But, neither the disputed or undisputed facts are critical to this motion to dismiss. The Defendant respectfully asserts that the PSC does not have jurisdiction to weigh the factual evidence and resolve the various disputes regarding these competing claims of real property rights.

Complainants rely upon several cases that have no relevance or bearing on the issue before the PSC in this case at hand, and are simply not on point. In these cases the appellate court is reviewing a sale and purchase of the entity, the "utility", and not the specific real

property that may be a part of the assets in the transaction. First, the Complainants reference *City of Catlettsburg v. Public Service Commission*, 486 S.W.2d 62 (Ky. 1972), which involved the sale of the City of Catlettsburg's water system, the utility, to the City of Ashland. The Court held, in pertinent part:

When an existing utility proposes to sell its system, the power and authority of the Public Service Commission are limited to a determination of whether or not the purchaser is ready, willing, and able to continue providing adequate service. *Public Service Commission v. Cities of Southgate, etc., Ky.*, 268 S.W.2d 19 (1954).

It may well be routine for the PSC to consider application by a utility to sell its system, or acquire another utility, but the Court in *City of Catlettsburg* did not consider any of the sorts of legal determinations that must be made in real property ownership disputes. Likewise, in *Public Service Commission v. Cities of Southgate*, 268 S.W.2d 19 (Ky. 1954), the Court addressed the PSC's jurisdiction to approve the sale and purchase of a utility and, again, this case contains no ruling related to the PSC's authority to make a determination of private property ownership. Of note, the Court did find "to require the commission to fix a specific valuation on the property, in a proceeding for sale, would unduly hamper and restrict the commission in later regulation of rates." *Id.* at 22. Consequently, the Court did not find it appropriate for the PSC to approve or disapprove the specific value of the utility being sold.

In another later case relied upon by Complainants, *Blue Grass State Tel. Co. v. Public Service Commission*, 382 S.W.2d 81 (Ky. 1964), the issue before the Court was the PSC's denial of a certificate of public convenience and necessity to a utility to operate a telephone system. The Court found, in discussing the underlying facts of the case:

The Commission determined that the depreciated original cost of this system was \$25,366.90, and its order shows that it refused to issue the certificate of convenience and necessity solely because of the disparity between this cost basis

and the sale price paid by Blue Grass. It assumed that the price paid would have to be considered as a determining factor in establishing a rate base at some later date.

*Id.* at 82. The Court held that:

The Commission apparently misinterpreted our holding in *Lexington Telephone Co. v. Public Service Commission*, 311 Ky. 584, 224 S.W.2d 423, wherein we held that under the facts presented the capital structure of the utility could not be completely disregarded in establishing a rate base. This does not mean that the Commission has no discretion in setting the rate base. If it is established that the price paid is grossly excessive or that the facilities purchased are not entirely usable, then the rate base should be adjusted accordingly. . . . Since, in the instant case, the Commission was not asked to approve an increase in rates and since, as indicated herein, they are not inflexibly bound by the purchase price whenever an increase in rates is considered, the holding of the Commission was premised on an improper conclusion regardless of whether \$120,000 was an unreasonable price.

Once again, as in the other cases relied upon by Complainants, there is no holding in *Bluegrass State Tel. Co.* that supports the Complainants argument that the PSC has jurisdiction to decide private property disputes in general, or to value real property in particular.

**III. THE WATER DISTRICT DISCONTINUED WATER SERVICE TO THE WAYNE FARM AT THE CUSTOMERS' REQUEST AND HAS NOT UNREASONABLY DENIED WATER SERVICE.**

Complainants claim that the water district discontinued water service to the "Wayne Farm" without prior warning or notice. It is the Defendant's position that water service was disconnected at the request of the customer. In Defendant's Response to Complainant's First Set of Interrogatories and Request for Production of Documents (hereinafter "Defendant's Discovery Response"), Attachment 7 has been produced. This document is a water district Work Order dated March 5, 2008, where it is noted "please disconnect service customer states that they have a leak and aren't sure when they will be able to fix." The Complainants acknowledge in their Complainant's Response to Public

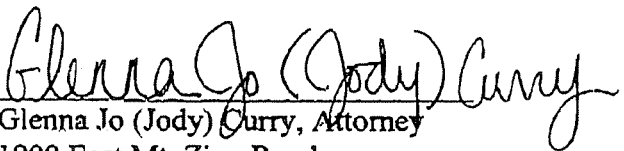
Service Commission's First Request for Information (hereinafter "Complainant's Discover Response"), Answers 10 and 21, that Mrs. Wayne made the request to stop the service because of the leak and the alleged threats made by Mr. Congleton's farm manager forbidding access to the Congleton property to repair the line.

Defendant asserts that they have never denied water service to the Complainants. Attachments 2 (letter sent to Mr. Wayne July 23, 2008) and 3 (letter dated November 19, 2008) of Defendant's Discovery Response are letters from the water district to Mr. Wayne indicating the water district's willingness to relocate the meter and restore water service to the "Wayne farm." These letters both pre-dated the February 12, 2009 letter from Mr. Wayne to the water district, wherein Mr. Wayne requests a meeting with the district to "discuss the ownership and use of our private water line" and the April 14, 2009 meeting. Complainants claim that the water district would not act on the Complainant's request. Upon request and payment of the connection fee, the water service was restored to the Wayne farm on or about November 2, 2009 (Defendant's Discovery Response, Attachment 9), with an agreement that the reconnection did not constitute a waiver by the parties' respective claims against the other. The only "inaction" of the water district is that they did not agree with Mr. Wayne's position that he was entitled to compensation from the district. There is no basis for speculating that water service would be "unreasonably discontinued" by the water district to the "Wayne farm", thus there is no basis for requiring a hearing before the PSC on the reconnection issue.

### CONCLUSION

The crux of the dispute being presented to the PSC in this case is the whether the Wayne Trust had any real property ownership in the land on which lies the water line in issue herein. Based upon the arguments set forth in Defendant's Motion to Dismiss and this Reply, the PSC has no grant of legislative authority to make a determination in regard to ownership of real property, or to the value real property for purposes of compensation.

Respectfully submitted,

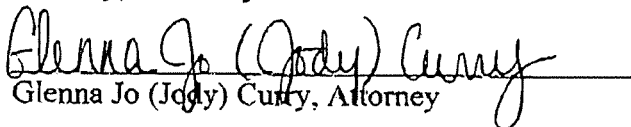


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Certificate of Service:

I hereby certify that a true and correct copy of the foregoing ANSWER was mailed by US mail, postage prepaid to the following this 4<sup>th</sup> day of June, 2009:

W. Henry Graddy, IV, Attorney  
W.H. Graddy & Associates  
P. O. Box 4307  
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Glenna Jo (Jody) Curry, Attorney