

BRUCE E. SMITH LAW OFFICES, PLLC
201 SOUTH MAIN STREET
NICHOLASVILLE, KENTUCKY 40356
(859) 885-3393 + (859) 885-1152 FAX

BRUCE E. SMITH
bruce@smithlawoffice.net

October 4, 2011

VIA FACSIMILE: (502) 564-3460
AND U.S. MAIL, FIRST CLASS

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

Re: **Case No. 2011 00297**
Reply to Response of Forest Creek and Motion to Dismiss for Lack of Jurisdiction

Dear Sir:

Enclosed for filing is an original and ten (10) copies of the above referenced document.
Upon receipt and review, please call with any questions.

Sincerely,



Bruce E. Smith

Enclosures

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OCT 04 2011

PUBLIC SERVICE
COMMISSION

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

FOREST CREEK, LLC)	
)	
COMPLAINANT)	
)	
VS.)	CASE NO. 2011-00297
)	
JESSAMINE-SOUTH ELKHORN)	
WATER DISTRICT)	
)	
DEFENDANT)	

REPLY TO RESPONSE OF FOREST CREEK
AND MOTION TO DISMISS FOR LACK OF JURISDICTION

Comes the Jessamine-South Elkhorn Water District ("JSEWD"), by counsel, and for its Reply to Forest Creek's Response to Motion to Hold in Abeyance and its Motion to Dismiss for lack of Jurisdiction, states as follows:

REPLY

Forest Creek, LLC's ("FC") Response sets forth three primary arguments in its attempt to counter JSEWD's Motion to Hold in Abeyance. First, it argues that JSEWD "does not assert that the Jessamine Circuit Court mischaracterized the nature of the declaratory judgment action ..." This criticism by FC is illusory. JSEWD's Motion recites the facts in support thereof including that the Public Service Commission of Kentucky's ("PSC") moved to dismiss the Jessamine Circuit Court action on the ground of lack of jurisdiction; that the Jessamine Circuit Court's Order granted the motion on such ground; and that JSEWD appealed such Order to the Kentucky Court of Appeals. It

ought to be quite obvious that JSEWD sharply disagrees with the Circuit Court's ruling and that it submits that the Circuit Court did not fully appreciate either the facts or the law involved in JSEWD's Petition for Declaration of Rights. To the extent that it is important to the PSC that JSEWD state what it already believes to be obvious, JSEWD "asserts" that the Jessamine Circuit Court "mischaracterized" the nature of the action when it decided to dismiss the Petition.

FC's second argument is that JSEWD did not assert in its Motion its disagreement with the proposition that the action in the Jessamine Circuit Court "involved issues related to utility rates and services or the applicability of KRS 278.040(2)..." Once again, FC attempts to manufacture a response from JSEWD not stating the obvious. Certainly, JSEWD strongly contends that its Petition did not involve issues of rates and services and that the PSC's involvement in this dispute violates the prohibition in KRS 278.040(2) of infringing on the contract rights of political subdivisions. Those arguments were central to its Response in the Circuit Court as to the PSC's motion to dismiss. As stated in the Motion being defended herein, the Circuit Court dismissed the Petition on the basis that it lacked jurisdiction under KRS 278.040(2) and JSEWD appealed that dismissal to the Court of Appeals. Once again, to cure any deficiency perceived by the PSC, JSEWD does not believe its action before the Jessamine Circuit Court involved the issues of rates and service and it submits that its contract rights are being abridged by the PSC contrary to KRS 278.040(). The Petition was a simple request for the Circuit Court to determine the enforceability of a contract between JSEWD and FC. Such enforcement would not directly impact rates and service. In support of its obvious disagreement with the Circuit

Court's ruling JSEWD attaches hereto as Exhibit "A" its Response¹ filed in the Jessamine Circuit Court to the PSC's Motions to Intervene and to Dismiss.

FC's last stab at countering JSEWD's Motion is the argument that JSEWD "did not argue that the Commission lacks jurisdiction over the present case ..." Although JSEWD did not expressly state in its Motion to Hold in Abeyance that the PSC lacks jurisdiction in the matter *sub judice*, it raised that defense in its Answer filed herein. JSEWD also disclosed in its Motion that it is pursuing an appeal in the Kentucky Court of Appeals. This appeal could result in a reversal of the Jessamine Circuit Court's grant of the PSC's motion to dismiss based on the ground of lack of jurisdiction. FC's argument in this regard ignores the fact that the PSC is a party to this appeal and, through counsel, is fully aware of the issues and law which were before the Jessamine Circuit Court and are now before the Kentucky Court of Appeals.

FC's assertion that the PSC has concurrent jurisdiction over the enforceability of the contract between FC and JSEWD overlooks two important arguments. First, in instances where there is concurrent jurisdiction, the principal of priority, sometimes referred to as the "rule of exclusive concurrent jurisdiction," controls and the body which first exercises jurisdiction acquires the exclusive jurisdiction to proceed until the matter is final. *City of Lincolnshire et al. v. Highbaugh Realty Company, et al.*, 278 S.W.2d 636, 637 (Ky. 1955). Secondly, in *Simpson County Water Dist. V. City of Franklin*, 872 S.W.2d 460, 464 (Ky. 1994), the Supreme Court held that where the sole issue is a matter of contract interpretation, jurisdiction lies with the courts of the Commonwealth and not the PSC. The PSC apparently thought it appropriate to

¹ Exhibit "A" references three cases cited therein as attached at particular Tabs. JSEWD did not attach these cases to Exhibit "A".

decline to rule on the complaint filed in *In the Matter of: Crestbrook Properties, LLC v. Northern Kentucky Water District*, Case No. 2001-00202 since the dispute was already being litigated in the Kentucky Court of Appeals and in spite of the fact that the PSC thought it had original jurisdiction over the matter. This lends credence to the PSC's recognition of the priority rule of the exclusive concurrent jurisdiction principal.

FC's effort at distinguishing the cases cited by JSEWD in support of its Motion to Hold in Abeyance also falls short of the mark. FC summarily dismisses the applicability of the holding of *In the Matter of: Crestbrook Properties, LLC v. Northern Kentucky Water District* Case No. 2001-00202 and of *In the Matter of: Application of New Cingular Wireless PCS, LLC for Issuance of a Certificate of Public Convenience and Necessity to Construct a Wireless Communications Facility at 114 Rising Son Lane, Prestonsburg, Floyd County, Kentucky, 41653*, Case No. 2009-00093 primarily based on JSEWD's purported error in not stating the obvious in its Motion. In addition, FC failed to mention that the present Complaint is similar to the Crestbrook Properties PSC case in that the present Complaint was also filed after the action was initiated in the circuit court. To the extent that the PSC believes that JSEWD has failed to argue that the Jessamine Circuit Court recharacterized the Petition filed by JSEWD; that JSEWD failed to argue that the Petition did not raise issues related to rates and service under KRS 278.040(2); and that the JSEWD did not assert the PSC's lack of jurisdiction and ask for dismissal herein, the JSEWD has cured those alleged deficiencies with this Reply and the following Motion to Dismiss. On the other hand, if, as the JSEWD contends, all of the foregoing issues were obviously implicit in JSEWD's Motion, the distinctions argued by FC to disregard these cases are meaningless. Whether or not the Court of Appeals is or is not

about to rule on the appeal of the Jessamine Circuit Court order dismissing is unimportant. The timing of the proceedings was not determinative of the holding of *In the Matter of: Southeast Telephone, Inc.'s Motion to Compel BellSouth Telecommunications Response Thereto*, Case No. 2007-0071. Furthermore, the stage of the proceedings in the Circuit Court or the Court of Appeals did not appear to be of any consequence in the *Crestbrook Properties'* PSC Order. For these reasons, JSEWD's decision not to mention the immediacy of the ruling of the Court of Appeals in its Motion is inconsequential.

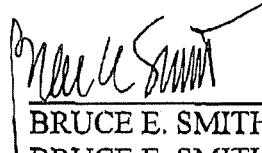
MOTION TO DISMISS FOR LACK OF JURISDICTION

JSEWD moves the PSC to dismiss FC's Complaint for lack of jurisdiction. In support of this Motion, JSEWD cites the arguments and law expressed in Exhibit "A" attached hereto.

CONCLUSION

FC's Response to JSEWD's Motion to Hold in Abeyance is nothing more than "smoke and mirrors" because the alleged failures to expressly argue particular points were all implicit in JSEWD's Motion and because FC's Response wrongly assumed that the PSC is ignorant of its involvement in the Jessamine Circuit Court action now on appeal. JSEWD reasserts that the issue pending before the Kentucky Court of Appeals is decisive of whether or not that the PSC can proceed herein because it addresses the questions of whether or not the enforceability of the contract between JSEWD and FC directly affects rates and service and whether or not the PSC's involvement impinges on the contract rights of JSEWD. If the Jessamine Circuit Court has jurisdiction because the contract does not directly affect rates and service, then the law dictates that the PSC does

not have the authority to proceed on FC's Complaint herein. Given the pendency of this appeal, the PSD has in the past held complaints filed under similar circumstances in abeyance. The JSEWD respectfully requests the same action.



BRUCE E. SMITH
BRUCE E. SMITH LAW OFFICES, PLLC
201 SOUTHMAIN STREET
NICHOLASVILLE, KY 40356
(859) 885-3393
Fax: (859) 885-1152
bruce@smithlawoffice.net
Attorney for JSEWD

CERTIFICATE OF SERVICE:

The undersigned hereby certifies that a true copy of the foregoing Reply to Response of Forest Creek and Motion to Dismiss for Lack of Jurisdiction was served on the following by U.S. Mail, first class, postage prepaid, this 4th day of October, 2011:

Robert C. Moore, Esq.
P.O. Box 676
Frankfort, Kentucky 40602-0676
Counsel for Complainant



BRUCE E. SMITH

g:\...JSEWD\Forest Creek\PSC Proceeding\Reply to Response of Forest Creek
and Motion to Dismiss for Lack of Jurisdiction

COMMONWEALTH OF KENTUCKY
THIRTEENTH JUDICIAL DISTRICT
JESSAMINE CIRCUIT COURT
CIVIL ACTION NO. 10-CI-01394

JESSAMINE-SOUTH ELKHORN WATER DISTRICT

PLAINTIFF

v.

JSEWD'S RESPONSE TO
COMMISSION'S MOTIONS
TO INTERVENE AND DISMISS

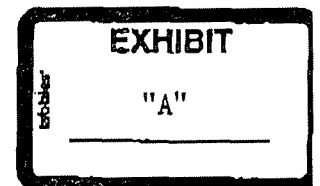
FOREST CREEK, LLC

DEFENDANT

Comes the Jessamine-South Elkhorn Water District ("JSEWD"), by counsel, and for its Response to the Motions of the Kentucky Public Service Commission ("Commission"), to intervene herein and to dismiss this action, states as follows:

INTRODUCTION

The Commission has filed companion motions to intervene and to dismiss both the Petition filed by the JSEWD and the Counterclaim filed by the Defendant, Forest Creek, LLC ("FC"). The resolution of each Motion turns on the answer to one central question and that is whether or not the Commission's exclusive jurisdiction as to the regulation of rates and service of a public utility is placed directly at issue by the Petition or the Counterclaim. If not, the Commission has no right to intervene or ask for dismissal. It is JSEWD's contention that the primary issue raised by the Petition and addressed by the Counterclaim is the enforceability of a contract¹ between it and FC which has no direct impact on rates or service.



¹ The subject contract ("Contract") provides that FC will, at its cost and under the JSEWD's guidelines, construct the water infrastructure for its development and then

ARGUMENT

Although the Commission does not specify whether it is moving under CR 24.01(a) or CR 24.01(b), it appears that its request to join this action falls under CR 24.01(b) since it cites no statute which confers upon it an unconditional right to intervene. Without waiving its position that the Commission is moving under CR 24.01(b) and out of an abundance of caution, the JSEWD has previously filed herein an objection to intervention under CR 24.01(a).

Pursuant to CR 24.01(b), a movant may intervene if it claims an interest relating to the transaction which is the subject of the pending action and the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect such interest. The interest which the movant seeks to protect must be direct, substantial and legally protectable. *U.S. v. Palermino*, 238 F.R.D. 118, 121 (D. Conn. 2006). The Commission stated on page 5 of its Motion to Dismiss:

The Commission's exclusive jurisdiction over utility rates and service is clearly established. 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 or rates and services of utilities [emphasis added].**"

The exclusive jurisdiction over the regulation of rates and service is the "interest" which the Commission seeks to protect by intervening and is also the basis on which it seeks dismissal of this lawsuit. If the enforcement of the Contract between JSEWD and FC

donate the facilities to JSEWD. This Contract does not provide for a recovery of any of this cost by FC. FC's position is that it now wants to make a new agreement under which the JSEWD constructs the infrastructure at the cost of FC. Under this agreement, FC will recover a portion of the cost from JSEWD each time a customer in the development connects to the water system.

does not affect rates and service, then the Commission has no direct or substantial "interest" which is legally protectable in this lawsuit and it has no grounds on which to request dismissal.

The only question posed by the JSEWD's Petition is the enforceability of the Contract between it and FC, a developer that is not a customer of JSEWD. FC's Counterclaim raises claims about the conduct of JSEWD in the negotiation of the Contract, the expenses paid by FC to JSEWD under the Contract and the review of its plans by JSEWD's engineer. Rates and service to customers of FC are not at issue. Clearly, the Commission has no interest on which to base its motion to intervene and it has no grounds for dismissal of this action based on its purported exclusive jurisdiction.

Although the Commission's Motions are persuasive on their face, the opinion of the Supreme Court in *Simpson County Water Dist. v. City of Franklin*, 872 S.W.2d 460 (Ky. 1994) casts a different light on their legal efficacy. The *Simpson County* case was a declaratory judgment action between a water district and a city over the passage of two (2) ordinances by the city which were aimed at overriding the enforceability of a prior water purchase agreement under which the city supplied water to the district. The contract that established the rate at which the water district purchased water from the city was not the focus of the dispute. It was the unilateral passage by the city of two ordinances which changed the contract rate charged for the water that provoked the lawsuit and was the focal point of the court's holding. The trial court dismissed the action because it concluded that it did not have subject matter jurisdiction. The Kentucky Court of Appeals reversed the Simpson Circuit Court and remanded the case. Although the

Supreme Court ultimately reversed the Court of Appeals and affirmed the Simpson Circuit Court's dismissal, it commented at page 464 of its Opinion:

The city urges that the circuit court should bear the jurisdiction of this case for no other reason than it is one of contract interpretation. Were this 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. *Texas Gas Transmission Corp. v. Shell Oil Co.*, 363 U.S. 263, 5 Ct. 1122, 4 L. Ed. 2d 1208 (1960). (Emphasis added)

From reading the opinion (Tab 1), it is apparent that the Supreme Court would have accepted the city's argument that the circuit court had jurisdiction if the city had not acted unilaterally to override the prior contract by the passage of the ordinances and threatened to terminate the supply of water to the district:

The City's unilateral adoption of the two water-rate ordinances doubled the water charge and, in no uncertain terms, was an act that **directly** related to the rate charged by the water district [to its customers]. The City's declaration to hold the parties' contracts null and void constitutes a practice relating to service of the water district. (emphasis added)

Simpson County, supra, at page 464.

The Supreme Court's statement that contract interpretation lies within the jurisdiction of the circuit court, and not the Commission's, where there is no direct impact on rates, is based upon KRS 278.040(2), cited by the Court at page 463 of the opinion:

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**. (Emphasis added)

The JSEWD is a political subdivision of the Commonwealth within the coverage of KRS 278.04(2). *Louisville Extension Water Dist. V. Diehl Pump & Supply Co.*, 246 S.W. 2d 585, 586 (Ky. 1952). In light of the Simpson County case, it is clear that the Jessamine Circuit Court, not the Commission, has jurisdiction over JSEWD's Petition and FC's Counterclaim. The JSEWD merely requests enforcement of the terms of its Contract to which FC objects. Although the Petition alleges that failure to enforce the commitment of FC under the Contract could lead to higher water rates, there will be no immediate and direct effect on rates charged to JSEWD's customers. In the event higher rates become necessary, such an increase would necessarily be the subject of an administrative proceeding before the Commission.

The earlier case of *Bee's Old Reliable Shows, Inc. v. Kentucky Power Co.*, 334 S.W.2d 765 (Ky. 1960), authority also cited by the Commission, is not only supportive of JSEWD's position, but it also demonstrates that the power of the circuit court as regards contract interpretation is broader, and the Commission's jurisdiction is more limited, than is argued by the Commission. In *Bee's*, a traveling carnival show sued Kentucky Power Company over the charge for connecting and disconnecting electrical service. In reversing the Board Circuit Court's dismissal of the action for lack of jurisdiction in favor of the Commission, the Court stated at page 767:

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.** The problem presented is the charge made for connecting and disconnecting such service. The appellant, by the very nature of its business, remains in one location for only a short period of time before moving to another

location. Thus the connection charge is a recurring one to appellant. The usual subscriber does not make sporadic use of power service, and, consequently, connection charges are of little concern to him. These parties have entered into a contract for service, which, obviously, is not akin to the usual service rendered to the public generally. **The contract here is of private concern to these parties. Under the circumstances, jurisdiction is not exclusive with the Public Service Commission, and the case should be submitted to the court.** (emphasis added)

The Bee's Court held that whether or not the dispute regards a rate charged for service, if the issue raised by the action does not involve rates for regular service charged to the public generally, jurisdiction is not exclusive to the Commission. (Tab 2)

The Contract sought to be enforced here does not involve any "rates" and FC will never be charged a rate by JSEWD, regular or otherwise. In the instant action, FC is not a customer of the SEWD and never will be and the cost of constructing the water service infrastructure and donating same to the JSEWD will not be a recurring expense. The construction of the infrastructure is a one-time cost to the developer which will be reflected in the sale price of each lot in the development. Clearly, the issue presented by JSEWD's Petition and FC's Counterclaim falls within the ambit of the *Bee's* holding which permits this Court to decide the controversy.

The foregoing cases are not isolated decisions. There are other cases in which the court has denied the Commission's claim that it has exclusive jurisdiction over contract disputes. The unpublished decision (Tab 3) of *Christian County Water District v. Hopkinsville Sewage and Water Works Commission*, 2009-CA-001543-MR (KYCA), held that the Commission did not have jurisdiction in a dispute between a water district and a municipal sewage and water works commission over an agreement in which the commission agreed not to raise rates charged to the water district for water supplied if the

water district agreed to transfer service territory in certain areas. The Christian Circuit Court held that it had jurisdiction to enforce the agreement between the parties. The Court of Appeals affirmed the Christian Circuit Court, and stated at page 5:

The PSC's authority should not "limit or restrict" ... contract rights" of cities or political subdivisions. KRS 278.040(2). A water district is a political subdivision within the statute's meaning. Louisville Est. Water Dist. v. Diehl Pump & Supply Co., 246 S.W.2d 585, 587 (Ky. 1952). Therefore, the PSC would have had no jurisdiction in this contractual matter. The trial court correctly determined that it alone had jurisdiction.

CJWD argues that the PSC has jurisdiction because the territory shift will affect its quality of service. We do not agree. **The current order solely addresses the validity of Agreement 2-2005 – not the collateral effects of its terms.** (Emphasis added)

There are striking similarities between the Christian County agreement and the Contract between JSEWD and FC. The Christian County contract capped the rates charged by the municipality if the water district agreed to transfer territory. Although the transfer of parts of the water district's territory could have a collateral adverse effect on service and rates, the appellate court held this impact was not enough to invoke the Commissioner's jurisdiction. Similarly, the option under which FC wants to proceed with the construction of the water infrastructure in its subdivision could have a collateral effect on rates, but any increase in rates would be subject to later determination by the Commission. As in the Christian County case, JSEWD is seeking a declaration that the Contract with FC is enforceable. If this Court finds otherwise, a rate-increase proceeding before the Commission may ensue similar to the filing of a complaint before the Commission by Christian County's customers over the quality of service resulting from a transfer of territory.

CONCLUSION

The jurisdiction of the Commission is strictly limited by statute to the regulation of rates and service. The cases have recognized and held that the Commission does not have jurisdiction over matters of contract interpretation where rates and service are not directly impacted. The *Bee's* case takes that concept a step further by confining the Commission's jurisdiction to direct impacts on rates charged for "regular service". JSEWD's Petition asks for enforcement of the Contract with FC regarding the installation of water infrastructure. The Counterclaim requests relief from the Contract. The Commission's Motions should be denied.



BRUCE E. SMITH, ESQ.
201 SOUTH MAIN STREET
NICHOLASVILLE, KY 40356
(859)885-3393
ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE:

The undersigned hereby certifies that a true copy of the foregoing Response to Commission's Motions to Intervene and Dismiss was served on the following by the method described below on August 8, 2011:

Helen C. Helton, Esq.
Gerald E. Wuetcher, Esq.
P.O. Box 915
Frankfort, KY 40602-0615
jwuetcher@ky.gov
By US Mail and E-Mail

Robert L. Gullette, Jr., Esq.
P.O. Box 915
Nicholasville, KY 40340-0915
BY US Mail and Personal Delivery



Bruce E. Smith