

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

April 5, 2012

RECEIVED

APR 06 2012

PUBLIC SERVICE  
COMMISSION

**VIA UPS OVERNIGHT DELIVERY**

Mr. Jeff R. Derouen  
Executive Director  
Kentucky Public Service Commission  
211 Sower Blvd.  
Frankfort, Kentucky 40602

Re: Case No. 2011-00297  
Motions for Rehearing/Reconsideration, etc.

Dear Sir:

Enclosed are my client's Motions for Rehearing/Reconsideration, to Stay Procedural Schedule and/or to Bifurcate and/or to Modify Procedural Schedule to Provide for Informal Conference in the above-mentioned case. Ten copies of the Motions are attached.

Sincerely,



Bruce E. Smith

Enclosures

COMMONWEALTH OF KENTUCKY

RECEIVED

BEFORE THE PUBLIC SERVICE COMMISSION

APR 06 2012

In the Matter of:

PUBLIC SERVICE  
COMMISSION

FOREST CREEK, LLC )  
 COMPLAINANT )  
 )  
 VS. )  
 )  
 JESSAMINE SOUTH ELKHORN )  
 WATER DISTRICT )  
 )  
 DEFENDANT )

CASE NO. 2011-00297

**MOTIONS FOR REHEARING/RECONSIDERATION, TO STAY PROCEDURAL  
 SCHEDULE AND/OR TO BIFURCATE AND/OR MODIFY PROCEDURAL  
 SCHEDULE TO PROVIDE FOR INFORMAL CONFERENCE**

Comes the Jessamine-South Elkhorn Water District (“District”), by counsel, and moves the Kentucky Public Service Commission (“PSC”), pursuant to KRS 278.400 and all other applicable law, for a rehearing and/or reconsideration of its decision to deny the District’s Motion to hold this case in abeyance as expressed in the PSC’s Order entered March 16, 2012 (“Order”). The District further moves the PSC to suspend and stay the schedule of procedural deadlines set forth in the Appendix to the Order. Finally, the District requests the PSC to bifurcate the issues raised by FC’s Complaint such that the enforceability of the subject contract portion is stayed to await the decision of the Kentucky Court of Appeals and the other issues raised in the PSC’s Order are addressed.

**I. Factual Error**

The PSC’s decision not to hold this proceeding in abeyance is based, at least in part, on a fact which is not supported by the record. The Order found: “At the time the

Circuit Court heard arguments on the Commission's motion to dismiss the Petition for Declaration of Rights, Forest Creek had yet to file its Complaint with the Commission."<sup>1</sup> The District respectfully disagrees with this assertion and points to the record in this proceeding and the Circuit Court action as support for its position.<sup>2</sup> The PSC's Motions to Intervene and to Dismiss were re-noticed for hearing by the PSC for August 11, 2011 at 9:00 AM. This re-notice was confirmed by Circuit Court's order entered July 21, 2011. [See attached Re-Notice of Motion to Intervene and Motion to Dismiss and Jessamine Circuit Court docket Order.] The record in the PSC action reflects that the Complaint of Forest Creek, LLC File (sic) Pursuant to KRS 278.260 was filed August 5, 2011. Accordingly, the Jessamine Circuit Court heard arguments six (6) days after the PSC action was initiated by Forest Creek, LLC ("FC"). The results of the Jessamine Circuit Court's rulings on the parties' arguments are reflected in its Order permitting intervention, entered August 15, 2011, and its Order dismissing, entered August 24, 2011. Although the PSC is correct in observing in its Order that "the Jessamine Circuit Court proceeding was not far advanced" at the time the FC Complaint was filed, the Order fails to take note of the extensive briefing that was done in the Circuit Court relative to the PSC's motions to intervene and to dismiss. More importantly, the Order does not recognize, although the PSC is a party to the appeal of the Jessamine Circuit Court action, that the District filed a brief on March 12, 2011 in the Kentucky Court of Appeals and that the PSC and FC have briefs due therein on May 11, 2012. The Kentucky Court of Appeals has had this appeal since September 16, 2011, when the Notice of Appeal was filed, or a period of six (6) months before the PSC Order was entered.

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<sup>1</sup> Order, page 12, lines 7-9.

<sup>2</sup> *Jessamine-South Elkhorn Water District v. Forest Creek, LLC*, Jessamine Circuit Court No. 10-CI-001394 (now Kentucky Court of Appeals No. 2011-CA-001714-MR)

## II. PSC Jurisdiction and Scope of Proceeding

The District respectfully takes issue with the PSC's assertion that the pending appeal is not decisive of the issue of the PSC's jurisdiction to hear FC's Complaint filed herein, or at the very least, as to the scope of the proceeding initiated by the PSC's Order of March 16, 2012.<sup>3</sup> The Jessamine Circuit Court's Order dismissing the District's Petition specifically found: "... the Court finds that the Plaintiff's Petition for Declaration of Rights involves issues of utility rates and service that, pursuant to KRS 278.040(2), are within the Commission's exclusive jurisdiction." If the Kentucky Court of Appeals reverses this ruling and adopts the argument propounded by the District, the result will be that the authority to decide the enforceability of the subject contract will lie with the Circuit Court, not the PSC. Such a ruling would necessarily negate the PSC's authority to address that issue.

The PSC has previously determined that it does not have jurisdiction to hear a complaint by a regulated utility against a customer. PSC Case No. 2009-00391, Jackson Energy Cooperative Corporation v. Booneville Cable Vision, et al. , Order of Nov. 2, 2009. Despite this finding, the PSC asserted in the Jessamine Circuit Court that it had exclusive jurisdiction over all aspects, including enforceability and interpretation, of the Interim Water Service Agreement that was the subject of the District's Petition in that Court. The PSC failed to advise that Court that it has previously held that it lacks jurisdiction over an action by a regulated utility against a customer. The PSC's finding in Case No. 2009-00391 is consistent with KRS 278.280, which is limited to complaints by any person **against** a utility.

The District's action in Jessamine Circuit Court was for a declaratory order, not a complaint per se, but neither KRS 278.260 nor KRS 278.280 provides any basis for a

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<sup>3</sup> Order, Page 12, lines 3-4.

utility to seek enforceable declaratory relief from the PSC as to an existing contract. As the Commission stated in its Motion to Dismiss in the Jessamine Circuit Court action:

“The rule is ... that a court will not take jurisdiction to render a declaratory judgment where another statutory remedy has been especially provided for the character of case presented, nor where the purpose is to affect proceedings which may be taken or pending before a public board which is vested with full power to act in the premises.” PSC Motion to Dismiss at page 9.

In this case, the PSC has no authority to consider or grant the declaratory relief sought by the District in the Jessamine Circuit Court.<sup>4</sup> While the PSC asserted to the Jessamine Circuit Court that JSEWD “may petition the Commission for an interpretation on Rule 26 and the Interim Water Service Agreement” (PSC Motion to Dismiss at page 8), KRS 278 limits the PSC to hearing complaints **against** a utility, not actions to declare a utility’s rights under an existing contract. No statutory authority or remedy exists at the PSC for enforceable declaratory relief in this instance. The PSC is not “vested with full power to act in the premises” of the District’s Petition for Declaratory Relief. As the legislature chose to withhold such authority from the PSC, if the District is also to be denied the right to assert its claims in the Jessamine Circuit Court, the District is effectively denied any forum in which to present its own claims unless and until an adverse party frames a complaint on its own terms. Such a result clearly creates significant due process concerns.

The District respectfully requests that the PSC reconsider its March 16, 2012 Order and grant JSEWD’s Motion to Dismiss this Complaint, at least as to issues concerning the Interim Water Service Agreement, without prejudice to Forest Creek’s

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<sup>4</sup> The District takes no position at this time as to whether the PSC’s Motion to Dismiss Forest Creek’s counterclaims was well founded, except to note that Forest Creek made no objection to dismissal and has not preserved any objection to that dismissal by an appeal.

Complaint, until all issues in the previously filed Jessamine Circuit Court appeal are finally adjudicated. In the alternative, JSEWD renews its motion to hold this proceeding in abeyance until final resolution of the pending appeal, at least as to issues relating to the current Interim Water Service Agreement.

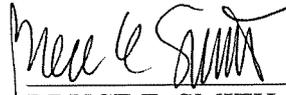
With respect to other issues that are raised in the March 16, 2012, Order, the District recognizes that KRS 278.260 authorizes the PSC even on its own motion to investigate whether the District's tariffs, rules and regulations are adequate or need to be prospectively amended or modified. Under KRS 278.280, the Commission has the clear authority to determine the rates, rules and procedures "to be observed" by a utility. The District is strongly desirous of indentifying any prospective modifications that may be necessary in its current tariffs and of taking corrective action where necessary.<sup>5</sup>

As a consequence, the District would respectfully request the PSC to bifurcate this matter. In other words, stay the enforceability issue, but proceed to adjudicate the others. Perhaps an informal conference between the parties and PSC Staff would be beneficial in sorting out the procedure to be followed under a bifurcation of the issues. The District is more than willing to engage in discussion with the PSC staff in an effort to prospectively resolve any issues with respect to its current tariffs, rules or policies. The District respectfully requests that the current procedural schedule be modified to allow for an informal conference with Staff to identify areas of concern and what actions would be required for the District to alleviate such concerns. The District believes that such an approach will resolve many, if not all, filing issues as stated in the PSC Order of March 16, 2012, in a judicially economical manner, and at the very least narrow the issues which may need to be adjudicated.

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<sup>5</sup> With respect to any claim by Forest Creek that could be construed to assert that the District willfully violated any provision of KRS278, the District denies any such claim, and its desire to prospectively resolve issues with respect to its current tariffs is not in any manner a waiver or admission that such conduct occurred.

Respectfully Submitted,



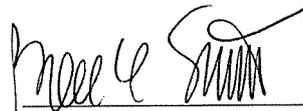
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201 SOUTH MAIN STREET  
NICHOLASVILLE, KY 40356  
(859) 885-3393  
Fax: (859) 885-1152  
bruce@smithlawoffice.net  
**ATTORNEY FOR DEFENDANT**

**CERTIFICATE OF SERVICE:**

The undersigned hereby certifies that a true copy of the foregoing Motions was served on the following by U.S. Mail, first class, postage prepaid, on April 5th, 2012:

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



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Bruce E. Smith

COMMONWEALTH OF KENTUCKY  
THIRTEENTH JUDICIAL CIRCUIT  
JESSAMINE CIRCUIT COURT  
CIVIL ACTION NO. 10-CI-1394

JESSAMINE-SOUTH ELKHORN WATER DISTRICT

PLAINTIFF

v.

**RE-NOTICE OF MOTION TO INTERVENE  
AND MOTION TO DISMISS**

FOREST CREEK, LLC

DEFENDANT

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Please take notice that the Public Service Commission of Kentucky hereby reschedules its Motion to Intervene and its Motion to Dismiss from July 28, 2011 until the next motion hour of August 11, 2011 at the hour of 9:00 a.m., or as soon thereafter as counsel may be heard.

Respectfully submitted,



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Helen C. Helton  
Gerald E. Wuetcher  
Post Office Box 615  
Frankfort, Kentucky, 40602-0615  
(502) 564-3940

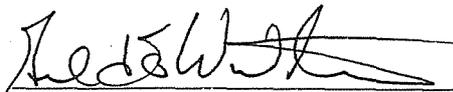
Counsel for Public Service Commission of  
Kentucky

CERTIFICATE OF SERVICE

I certify that the foregoing Re-Notice has been served by electronic mail and facsimile the 17<sup>th</sup> day of July, 2011, to the following:

Bruce E. Smith, Esq.  
Bruce E. Smith Law Offices, PLLC  
201 South Main Street  
Nicholasville, Kentucky 40356

Robert L. Gullette, Jr., Esq.  
Post Office Box 915  
Nicholasville, Kentucky 40340

A handwritten signature in black ink, appearing to read "Gerald E. Wuetcher", written over a horizontal line.

Gerald E. Wuetcher

AOC-950  
11-87

Commonwealth of Kentucky  
Court of Justice



CALENDAR

ENTERED  
Date  
JUL 21 2011  
Time  
DOUG FAIN, JESSAMINE CIRCUIT CLERK  
BY

COURT

JUDGE

Case No.	Style	Charges or Claim	Proceedings
10-CI-1394	Jessamine-South Elkhorn Water District v	Order	The Order entered herein on 7-7-11 granting the PSC
	Forest Creek, LLC		Motion to Intervene was done so inadvertently and is hereby set
			aside.
			All pending matters have been rescheduled to 8-11-11 9:00 am
			 7-20-11
		A TRUE COPY ATTEST: DOUG FAIN, JESSAMINE CIRCUIT CLERK DATE:  7-21-11	DEPUTY

Judge Signature

Date