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May 1, 2012

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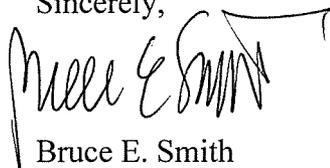
Mr. Jeff R. Derouen
Executive Director
Kentucky Public Service Commission
211 Sower Blvd.
Frankfort, Kentucky 40602

Re: Case No. 2011-00297
Reply by Water District to Response of Forest Creek
Opposing Water District's Motions for Rehearing/Reconsideration, etc.

Dear Sir:

Enclosed is my client's Reply as referenced above. Ten copies of the Reply are attached.

Sincerely,


Bruce E. Smith

Enclosures

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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**PUBLIC SERVICE
COMMISSION**

**REPLY BY WATER DISTRICT TO RESPONSE OF FOREST CREEK OPPOSING
WATER DISTRICT'S MOTIONS FOR REHEARING/RECONSIDERATION, TO STAY
PROCEDURAL SCHEDULE AND/OR BIFURCATE AND/OR MODIFY
PROCEDURAL SCHEDULE TO PROVIDE FOR INFORMAL CONFERENCE**

Comes now Jessamine – South Elkhorn Water District (“Water District”), by counsel, and for its Reply to the Memorandum in Opposition to Jessamine – South Elkhorn Water District’s Motion for Rehearing/Reconsideration filed by Complainant, Forest Creek LLC (“Forest Creek”), states as follows.

I. Objection to Filing of Motion for Rehearing

Forest Creek first objects to the Water District filing a Motion for Rehearing under KRS 278.400 because no determination has been made in a hearing in this case. This objection ignores cases in which the Kentucky Public Service Commission (“Commission” or “PSC”) has considered a Petition for Rehearing, and even granted a rehearing, when an Order or other

determination has been issued prior to any hearing on the matter for which rehearing is sought.¹ In one very recent example, in an Order issued on February 27, 2012 in Case No. 2011-0041, the Commission considered a Motion for Rehearing filed by Riverside Generating Company, LLC, concerning intervention, although the record does not indicate any hearing on the intervention request prior to the Order denying intervention. No mention was made of any procedural defect in filing such a motion for rehearing. As another example, in an Order dated July 15, 2011, in Case No. 2010-00375, the Commission actually granted a rehearing requested by Meade County RECC under KRS 278.400 although no hearing was ever held in that proceeding.

The Commission has not interpreted KRS 278.400 as applying only to Motions that seek rehearing of determinations made following a hearing. The Motion was timely filed and should be considered. In addition, the Water District moved for reconsideration of the Order in question. Even if the Commission should find that a Motion for Rehearing is not technically appropriate as no hearing has been held, there is no impediment to the Commission considering the pleading solely as a Motion for Reconsideration, and granting the Water District relief on that basis.

II. Additional Evidence

Forest Creek states that the Motions filed by the Water District should be denied because no additional evidence was offered. As clearly stated in the Water District's pleading, the Commission Order contains a glaring error of material fact. Forest Creek in fact filed its Complaint at the Commission prior to oral argument or any Order of the Jessamine Circuit Court dismissing either the Water District's pending declaratory judgment action or Forest Creek's own counterclaims in the same action. Claims concerning the very underlying transaction that is

¹ See, e.g., PSC Case No. 2011-00401, Petition for Rehearing considered where a Motion to Intervene was rejected without a hearing; PSC Case No. 2005-00320, Motion for Rehearing considered where case dismissed without a hearing.

the basis of Forest Creek's PSC complaint were still pending in Jessamine Circuit Court, including Forest Creek's own claims, when Forest Creek filed its complaint at the Commission. The Commission relied on a factually inaccurate statement that no complaint had been filed at the Commission prior to oral argument in the Jessamine Circuit Court.²

Further, the Commission made no reference whatsoever in its Order to the fact that the Water District had already filed its initial brief in the Court of Appeals³ appeal of the Jessamine Circuit Court Order dismissing the Water District's declaratory judgment action. Forest Creek continues to claim that its Commission complaint is somehow different from its claims in Jessamine Circuit Court, but the claims arise from the same transaction.

While Forest Creek attempts to distinguish its complaint from the pending case at the Court of Appeals, Forest Creek's obvious intent is to have the Public Service Commission rescind the Interim Water Service Agreement with the Water District. Forest Creek's claim that different transactions or issues are involved insofar as the Interim Water Service Agreement is concerned is simply sophistry. The Water District sought a declaration in the Jessamine Circuit Court that the Interim Water Service Agreement was enforceable – Forest Creek now specifically seeks an Order from the Commission that the Agreement is “unenforceable”⁴ The same issue that was first before the circuit court, and is currently before the Court of Appeals, is now also before this Commission. The Commission is both tryer and adverse party due to Forest Creek's actions. There is no reasonable basis for this Commission to continue to try this case until the pending Court of Appeals case is resolved, as two actions on the same transaction may well result in conflicting determinations both as to jurisdiction and enforceability of the underlying agreement and transaction.

² Order of March 16, 2012 at page 12.

³ Case No. 2011-CA-001714

⁴ Forest Creek Memorandum in Opposition at fourth unnumbered page.

III. Bifurcation and Abeyance

Forest Creek demands that the Commission refuse to bifurcate this proceeding so that prior pending questions as to proper jurisdiction on the underlying transaction can be properly resolved in the Court of Appeals. Forest Creek also demands that the Commission continue on its collision course with the Court of Appeals, rather than agreeing to the Water District's eminently reasonable proposal that the Commission hold proceedings on the underlying contract issue in abeyance while moving forward with any concerns that the Commission has with the Water District's tariffs on a prospective basis, as clearly contemplated by KRS 278.260 and KRS 278.280. Forest Creek claims that such an action "will merely result in more injury to Forest Creek..."⁵.

Forest Creek has not been injured by the Water District. Forest Creek has repeatedly failed to propose a complete plan for an extension, despite multiple opportunities to do so. The lawyer who has represented Forest Creek over this period has admitted that delays in this development have been due to a bad economy and numerous litigations from the beginning of the project.⁶ Forest Creek never made any effort to bring a complaint or proceeding of any kind before this Commission until its Agreement with the Water District had been in effect for more than four years. Now that Forest Creek is apparently finally ready to proceed with its long delayed development, it claims that any delay will "further injure" it. Even after Forest Creek's unfounded claim that it first learned about Option I in the middle of 2010, it did not file a claim

⁵ Forest Creek goes on to describe itself as "the Water District's customer". This description is misleading in that Forest Creek is not seeking water service per se – it is seeking to extend service to a development in which owners of properties in the development will be water service customers of the Water District. Forest Creek has not proposed any plan to take water service as a customer of the Water District.

⁶ See the Water District's Motion to Dismiss, filed April 25, 2012, which is hereby incorporated by reference.

with this Commission for another year or more. If Forest Creek has suffered any harm, it is self inflicted.⁷

The Water District has made an eminently reasonable Motion to bifurcate this proceeding - to hold in abeyance the part of this case that specifically relates to the underlying transaction pending finality in the action now at the Court of Appeals - while proceeding with a process to resolve on a prospective basis any issues with the Water District's filed tariffs or extension policy.

IV. Improper Use of Commission Proceeding

The Water District objects to the continuation of the procedural schedule in this case. It is increasingly evident that Forest Creek is using this proceeding to gather information for use in its pending civil action in the Jessamine Circuit Court, Case No. 12-CI-00081. The Commission is not bound by the technical rules of legal evidence. KRS 278.310. Forest Creek's overbroad and voluminous requests have little or nothing to do with the underlying transaction before the Commission. However, responses being filed by the Water District are then quickly made a part of the record in Forest Creek's pending Jessamine Circuit Court case, Case No. 12-CI-00081⁸. Indeed, the Jessamine Circuit Court did not even dismiss Forest Creek's counterclaim in Case No. 10-CI-01394, so that case is still pending as well.

Forest Creek currently has pending its counterclaim in Jessamine Circuit Court, Case No. 10-CI-01394; its Complaint before this Commission; and another complaint in Jessamine Circuit Court in Case No. 12-CI-00081, in which discovery from this complaint case is being used to try

⁷ The Water District remains committed to proceeding with this extension when and if Forest Creek finally submits a full set of construction plans. See letter of March 27, 2012 attached hereto.

⁸ For more on this proceeding, see the Water District's pending Motion to Dismiss or Supplement.

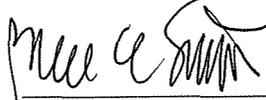
to support a conspiracy claim against named and unnamed individuals⁹. The Commission has had the Water District's declaratory judgment action against Forest Creek dismissed, due to the Commission's claim that it has exclusive jurisdiction over all aspects of the extension of water facilities to Forest Creek's proposed development. However, Forest Creek is litigating the same issue in three separate cases, and using what it apparently perceives to be the wide open discovery permitted in Commission proceedings to gather information to be used in all of its pending proceedings. The Water District objects to this use of the Commission complaint procedure, and will assert this objection to all requests being made by Forest Creek in this Commission proceeding. This use of the complaint process by Forest Creek, the full extent of which has only been discovered this week with Forest Creek almost immediately filing discovery from this case in Jessamine Circuit Court, should not be tolerated by this Commission. The "multiple forum" strategy being employed by Forest Creek is additional strong support for the Water District's motion that the Commission bifurcate this proceeding and hold the contract issues in abeyance until such time as the Water District's Court of Appeals claim is resolved with finality.

Wherefore and without waiving its Motion to Dismiss and Alternatively, Motion to Suspend Proceedings and Supplement the Record¹⁰, the Water District moves that the Commission grant the relief requested in the Water District's Motion of April 6, 2012, and any and all other relief to which it is entitled.

⁹ It is with respect to Case No. 12-CI-00081 that Forest Creek made an improper ex parte communication to the Commission on April 11, 2012; Forest Creek attempted to recruit a Commission staff attorney to argue a Motion in the Jessamine Circuit Court, although Forest Creek apparently would have had the Commission argue the opposite of what it argued in Case No. 10-CI-01394, as Forest Creek is asserting in Case No. 12-CI-00081 that the court, not the Commission, should review Forest Creek's claims that the water extension to its development has been unreasonably impeded by the Water District.

¹⁰ Filed April 25, 2012.

Respectfully Submitted,

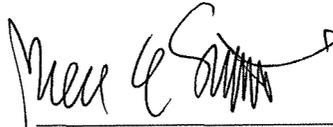


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ATTORNEY FOR WATER DISTRICT

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 May 1, 2012:

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



Bruce E. Smith

Jessamine-South Elkhorn Water District

802 South Main Street, P.O. Box 731
Nicholasville, Kentucky 40356
Phone: (859) 881-0589 Fax: (859) 881-5080

March 27, 2012

Jihad A. Hallany, PE
Vision Engineering
3399 Tates Creek Rd., Suite 250
Lexington, KY 40503

FILE COPY

Subject: Location Corridor, Offsite Utilities, Forest Brook Subdivision.

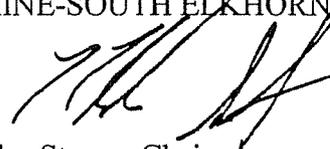
Dear Mr. Hallany:

The Committee has reviewed your plans showing the location corridor for the proposed offsite utilities for Forest Brook Subdivision and has found the proposed position located within our service territory to be acceptable. It is our assumption that your omission of sheets 13 thru 16 is because that portion falls within the City of Wilmore, and we concur that location acceptance is the purview of the City of Wilmore .

However, I would again point out to you that final approval of the construction plans is predicated on the fact that the plans must be complete. That is, continuity of service from beginning to end, and specific construction details and specifications for all components including, telemetry, pumps, master meter, etc.

We have instructed our consulting engineers to be available to meet with you and assist in whatever manner possible. Please contact them at your convenience.

Sincerely,
JESSAMINE-SOUTH ELKHORN WATER DISTRICT


L. Nicholas Strong, Chairman

LNS/jt

cc: James Kelley
David Carlstedt
Horne Engineering, Inc.
Eng: 3803/3719
Eng: 3978
Corr