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VIRGINIA:

BEFORE THE STATE CORPORATION COMMISSION
At Richmond, July 6, 2009

DOUGLAS ROBERT JOHNSON
Petitioner,

v.

Case No.: CLK-2009-00012

FLUVANNA COUNTY BOARD OF SUPERVISORS,
LOUISA COUNTY BOARD OF SUPERVISORS,
and
JAMES RIVER WATER AUTHORITY,
Respondents.

MEMORANDUM OF LAW IN OPPOSITION TO CLERK'S MOTION TO DISMISS

COMES NOW your Petitioner, Douglas Robert Johnson, pursuant to the Scheduling Order of May 8, 2009, and, for its objection to the Clerk's motion to dismiss this cause for lack of standing, respectfully says as follows:

ARGUMENT

1. James River Water Authority does not have stock.

If the only choices are a stock corporation and a nonstock corporation, that makes James River Water Authority a nonstock corporation.

2. All corporations chartered under the Virginia Nonstock Corporation Act are nonstock corporations.

If you think this proves that the James River Water Authority was chartered under the Virginia Nonstock Corporation Act, you just flunked Logic 101.

3. James River Water Authority may or may not be a Public

Service Company depending on an exception.

Title 56, Public Service Companies, has a definition section which says:

§ 56-1. Definitions.

Whenever used in this title, unless the context requires a different meaning:

(other definition excluded for brevity.)

"Corporation" or "company" includes all corporations created by acts of the General Assembly of Virginia, or under the general incorporation laws of this Commonwealth, or doing business therein, and shall exclude all municipal corporations, other political subdivisions, and public institutions owned or controlled by the Commonwealth.

4. The Virginia Nonstock Corporation Act is a general incorporation law of this Commonwealth.

I have personally filed articles of incorporation with the Commission for the formation of a limited liability company. That fell under a "general incorporation law". There are specific rules appropriate to each of these general laws. When I formed my LLC, I could have formed a stock corporation instead under the Virginia Stock Corporation Act. If I were to incorporate my model train club, we would fall under the Virginia Nonstock Corporation Act and those rules would apply.

5. James River Water Authority chartered under the Virginia Water and Waste Authorities Act.

Notice the definition above says "acts of the General Assembly of Virginia, or under the general incorporation laws". There is an

"either or" statement here. It is either the Virginia Water and Waste Authorities Act or any one of the various "general incorporation laws" such as the Virginia Nonstock Corporation Act.

6. Virginia Water and Waste Authorities Act stands alone.

The Virginia Water and Waste Authorities Act does not need the Virginia Nonstock Corporation Act. The specific language says:

§ 15.2-5100. Title of chapter.

This chapter shall be known and may be cited as the "Virginia Water and Waste Authorities Act." This chapter shall constitute full and complete authority, without regard to the provisions of any other law for the doing of the acts herein authorized, and shall be liberally construed to effect the purposes of the chapter.

(Code 1950, § 15-764.1; 1950, p. 1312; 1962, c. 623, § 15.1-1239; 1997, c. 587.)

7. Clerk of Commission contradicts James River Water Authority Articles of Incorporation.

The specific language of the Articles of Incorporation say that it is creating "an authority pursuant to the Virginia Water and Waste Authority Act (Chapter 51, Title 15.2, §§ 15.2-5100 et seq...." while the Clerk of the Commission says "the articles of incorporation contemplated, and resulted in, the formation of a domestic nonstock corporation under Chapter 10 of Title 13.1...." The problem is that while they may have contemplated Chapter 10, Title 13.1, the articles actually say Chapter 51, Title 15.2. Therefore, the James River Water Authority is under Chapter 51, Title 15.2 and not Chapter 10 of Title 13.1.

8. Clerk of Commission specifies wrong law pertaining to the James River Water Authority Certificate of Incorporation.

The Clerk says, in item 7 of Clerk's Response to Petition, that the Commission issued the Certificate of Incorporation according to § 13.1-820. when the appropriate code is § 15.2-5108.

This is an understandable error as the two Acts have similar sections. Let us examine the two sections. Chapter 10 of Title 13.1 says:

§ 13.1-820. Issuance of certificate of incorporation.

If the Commission finds that the articles of incorporation comply with the requirements of law and that all required fees have been paid, it shall issue a certificate of incorporation.

When the certificate of incorporation is effective, the corporate existence shall begin. Upon becoming effective, the certificate of incorporation shall be conclusive evidence that all conditions precedent required to be performed by the incorporators have been complied with and that the corporation has been incorporated under this Act.

(Code 1950, §§ 13-223, 13-224, 13.1-232, 13.1-233; 1956, c. 428; 1985, c. 522; 2007, c. 925.)

and Chapter 51 of Title 15.2 says:

§ 15.2-5107. Filing articles of incorporation.

After adoption or approval of an ordinance, resolution or agreement creating an authority, the governing bodies of the participating localities shall file with the State Corporation Commission the authority's articles of incorporation.

(Code 1950, § 15-764.7; 1950, p. 1316; 1962, c. 623, § 15.1-1245; 1973, c. 478; 1997, c. 587.)

and

§ 15.2-5108. Issuance of certificate or charter.

The State Corporation Commission shall issue a certificate of incorporation or charter to the authority if it finds that:

1. The articles of incorporation conform to law; and
2. The estimated costs and rates for services of the proposed projects are fair and equitable, and have been advertised under § 15.2-5104 or subsection A of § 15.2-5156, as applicable.

Upon the issuance of the certificate or charter such authority shall be conclusively deemed to have been lawfully and properly created and established and authorized to exercise its powers under this chapter.

(Code 1950, § 15-764.8; 1950, p. 1316; 1962, c. 623, § 15.1-1246; 1973, c. 478; 1983, c. 80; 1984, c. 239; 1997, c. 587; 2009, c. 473.)

And so... Where the Nonstock Act says "the certificate of incorporation shall be conclusive evidence that all conditions precedent required to be performed by the incorporators have been complied with and that the corporation has been incorporated under this Act" the Water Act says "Upon the issuance of the certificate or charter such authority shall be conclusively deemed to have been lawfully and properly created and established and authorized to exercise its powers under this chapter". That proves an "either-or" status. An entity cannot be created simultaneously under two separate Acts where each has different terms and conditions.

Therefore the "Title 15.2 - COUNTIES, CITIES AND TOWNS Chapter 51 - Virginia Water and Waste Authorities Act" is the controlling law and the "Title 13.1 - CORPORATIONS. Chapter 10 - Virginia Nonstock Corporation Act" is not the controlling law.

9. Clerk of Commission documents speak for themselves.

The Clerk says, in item 7 of Clerk's Response to Petition, that the Commission issued the Certificate of Incorporation according to § 13.1-820. Two Exhibits are included with that Response, Exhibit A and Exhibit B. Neither of those documents specify anywhere any reference to Chapter 10 of Title 13.1 but does have specific reference to Chapter 51 of Title 15.2.

10. Commission rules allow rehearing or reconsideration.

The Clerk's Argument is erroneously based on Chapter 10 of Title 13.1 being the controlling law. That law is included as an exception to Commission rule which says:

5 VAC 5-20-220. Petition for rehearing or reconsideration.

Final judgments, orders, and decrees of the commission, except judgments prescribed by § 12.1-36 of the Code of Virginia, and except as provided in §§ 13.1-614 and 13.1-813 of the Code of Virginia, shall remain under the control of the commission and subject to modification or vacation for 21 days after the date of entry. Except for good cause shown, a petition for rehearing or reconsideration must be filed not later than 20 days after the date of entry of the judgment, order, or decree. The filing of a petition will not suspend the execution of the judgment, order, or decree, nor extend the time for taking an appeal, unless the commission, within the 21 day period following entry of the final judgment, order or decree, shall provide for a suspension in an order or decree granting the petition. A petition for rehearing or reconsideration must be served on all parties and delivered to commission staff counsel on or before the day on which it is filed. The commission will not entertain responses to, or requests for oral argument on, a petition. An order granting a rehearing or reconsideration will be served on all parties and commission staff counsel by the Clerk of the Commission.

Please note that Chapter 51 of Title 15.2 is not listed as an exception to 5 VAC 5-20-220 thus rule 5 VAC 5-20-220 does apply to this action.

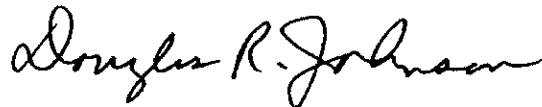
CONCLUSION

Simply stated, whether or not the James River Water Authority is a nonstock corporation and whether or not it is a Public Service Company, it was created under Chapter 51 of Title 15.2 and not under Chapter 10 of Title 13.1 so all of the prohibitions against a rehearing or reconsideration are not applicable. While Petitioner would not have standing under Chapter 10 of Title 13.1, he clearly does under Chapter 51 of Title 15.2.

Wherefore this Petitioner, Douglas Johnson, prays the Commission deny the Motion to Dismiss the Petition and requests to be heard.

Respectfully submitted,

DATED: July 6, 2009



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Memorandum in Opposition to the Motion to Dismiss, concerning petition to deem certificate of authority void *ab initio* and for injunctive relief, was mailed the 6th day of July, 2009, to:

DEFENDANT FLUVANNA COUNTY BOARD OF SUPERVISORS at:

Frederick W. Payne, Esquire
Fluvanna County Attorney
414 East Jefferson Street
Charlottesville, VA 22902

and

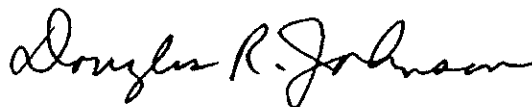
DEFENDANT LOUISA COUNTY BOARD OF SUPERVISORS at:

Gregory Hoffmann, Esquire
County Attorney for Louisa County
PO Box 160
1 Woolfolk Avenue
Louisa, VA 23093.

and

DEFENDANT JAMES RIVER WATER AUTHORITY at:

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