

COMMONWEALTH OF VIRGINIA  
STATE CORPORATION COMMISSION

CLERK'S OFFICE

**DOUGLAS ROBERT JOHNSON,**  
**Petitioner**

2009 AUG 13 PM 1:04

v.

CASE NO. CLK-2009-00012  
DOCUMENT CONTROL

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

**REPORT OF HOWARD P. ANDERSON, JR., HEARING EXAMINER**

**August 13, 2009**

On April 27, 2009, Douglas Robert Johnson ("Petitioner"), pro se, filed a Petition and Affidavit in the Office of the Clerk against the Respondents and the State Corporation Commission ("Commission"). The Petition alleged that the Fluvanna County Board of Supervisors ("Fluvanna Board"), at a meeting held on April 15, 2009, was presented with a petition containing over 1,700 valid signatures seeking a public referendum in Fluvanna County, Virginia, on a proposal by Respondents Fluvanna Board and Louisa County Board of Supervisors ("Louisa Board") (collectively, "Boards") to form a joint water authority; that the Fluvanna Board rejected said petition; that the Boards thereafter filed articles of incorporation for the proposed joint water authority with the Commission; and that the Commission, on April 21, 2009, issued a certificate of incorporation of the joint water authority named James River Water Authority ("JRWA"). The Petition seeks a declaration that the certificate of incorporation of JRWA is void *ab initio*, an injunction against the Fluvanna Board from forming a water authority until a referendum is held, and other relief.

On May 8, 2009, the Commission issued a Scheduling Order docketing the Petition; assigning the matter to a Hearing Examiner; directing the Respondents to file an answer or other responsive pleading; and directing the Office of the Clerk of the Commission to respond to the Petition and address, in particular, the specific requests for relief therein.

On June 1, 2009, responsive pleadings and Motions to Dismiss with supporting Memoranda were filed by Respondents. In their Motions to Dismiss, Respondents argue that Petitioner lacks standing to challenge the action of the Commission, that the order of the Commission creating the JRWA is conclusive and not subject to collateral attack, and that the Commission does not have jurisdiction to review the action of the Fluvanna Board.

Finding that Petitioner should be given an opportunity to respond to the Motions to Dismiss, a Ruling dated June 2, 2009, was issued directing Petitioner to respond to the Motions to Dismiss on or before June 12, 2009.

On June 9, 2009, Petitioner filed an Objection to Motion to Dismiss (“Objection”) with a supporting Memorandum, in which he argued that the Commission did not have jurisdiction to issue a certificate to JRWA and the Commission should revoke the certificate because it was issued without knowledge of two pending circuit court cases challenging the creation of the water authority. Petitioner maintained the Motions to Dismiss should be denied and Petitioner requested an opportunity to be heard.

On June 12, 2009, Petitioner filed a Memorandum of Law Supplement in Opposition to Motion to Dismiss correcting a typographical error in the first Memorandum and providing new information pertaining to petitions filed with the Fluvanna Board.

On June 29, 2009, Petitioner filed a Motion for Summary Judgment with a supporting Memorandum, to deem the certificate issued to JRWA void *ab initio* and for injunctive relief.

The sequence of events leading to the filing of this Petition is as follows:

1. On March 18, 2009, after giving proper notice, the Fluvanna Board held a public hearing to consider the formation of a public water authority pursuant to the Virginia Water and Waste Authorities Act, § 15.2-5100 *et seq.* of the Code of Virginia. Petitioner did not attend the hearing, but sent a letter that was read.
2. A citizen petition calling for a referendum on the issue of creating a water authority was presented at the Fluvanna Board meeting. On advice of the County attorney, the Fluvanna Board rejected the petition as not conforming to the requirements of § 24.2-684.1 of the Code of Virginia pertaining to voter petitions calling for a referendum.
3. Pursuant to Va. Code § 15.2-5105, the Fluvanna Board voted down a motion to petition the Circuit Court to order a referendum.
4. After the March 18, 2009, meeting, Petitioner filed his petition with the Circuit Court as required by Va. Code § 24.2-684.1. The Clerk approved the form of the petition on March 24, 2009, and Petitioner then gathered signatures. Petitioner filed his petition with signatures with the clerk of the Circuit Court on April 15, 2009.
5. On April 20, 2009, the Fluvanna Board met in formal session and reviewed the action taken with respect to the petition presented at the March 18 meeting. After defeating another motion to petition the Circuit Court for a referendum on the creation of the water authority, the Fluvanna Board adopted a resolution creating the JRWA.
6. On April 20, 2009, the Louisa Board approved the resolution for the formation of JRWA.
7. On April 21, 2009, the application for the issuance of a charter was filed with the Commission, and on the same date the Clerk of the Commission issued a certificate of incorporation for JRWA.

8. On April 27, 2009, Petitioner filed this Petition with the Commission.

9. On May 5, 2009, Petitioner wrote to the Commission stating: "Kindly either accept jurisdiction for this SCC Petition or forward it to the Supreme Court." When Petitioner did not get a response, he then filed a Notice of Appeal to the Virginia Supreme Court on May 8, 2009, at 11:29 a.m. At 4:20 p.m. on that same day, the Commission issued its Scheduling Order apparently accepting jurisdiction.<sup>1</sup>

10. On May 15, 2009, the Fluvanna Circuit Court convened a hearing on the actions of the Fluvanna Board and Petitioner's request that a referendum be held regarding the creation of a water authority.

11. On May 18, the Fluvanna Circuit Court issued an order denying Petitioner's request for relief.

By ruling dated June 30, 2009, Respondents were directed to file any responses to Petitioner's Motion for Summary Judgment on or before July 13, 2009.

Also on June 30, 2009, the Clerk of the Commission, by counsel, filed a Clerk's Response to Petition ("Clerk's Response") denying Petitioner's allegation that the Commission has jurisdiction in this matter. The Clerk further stated that the articles of incorporation for JRWA complied with applicable law and, pursuant to § 13.1-820 of the Code, the Clerk issued a certificate of incorporation to JRWA on April 21, 2009. The Clerk stated that once a certificate is issued, the Commission's authority to afford relief to Petitioner is constrained and governed by § 13.1-813 of the Code. Section 13.1-813 confers standing to file a petition only upon a member or director of the corporation. The Clerk moved for dismissal of the Petition because Petitioner is not a member or director of JRWA and, therefore lacks standing to seek the relief requested in the Petition.<sup>2</sup>

On July 6, 2009, Petitioner filed an Objection to Motion to Dismiss ("Objection") with a supporting Memorandum of Law in which he stated that the Clerk's Motion to Dismiss is incorrectly based on the assumption that the JRWA was chartered under the Virginia Nonstock Corporation Act. Petitioner states the JRWA was chartered under the Virginia Water and Waste Authorities Act. Petitioner argued the language of the Virginia Nonstock Corporation Act, relied upon by the Clerk, is not applicable to the Virginia Water and Waste Authorities Act.

On July 13, 2009, Respondent Fluvanna Board filed a Response to Petitioner's Motion for Summary Judgment ("Fluvanna Board Response") requesting that the Petition be dismissed on two grounds: Petitioner has appealed this case to the Virginia Supreme Court and therefore the Commission no longer has jurisdiction; and the determination of whether the Fluvanna Board improperly disregarded the citizen petition calling for a referendum is properly before the Fluvanna Circuit Court and is a matter over which the Commission has no jurisdiction.<sup>3</sup>

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<sup>1</sup> Petitioner's Response of July 15, 2009, at 3.

<sup>2</sup> Clerk's Response at 2-3.

<sup>3</sup> Fluvanna Board Response at 4, 7.

On July 13, 2009, the Louisa Board filed a Response adopting in their entirety the arguments contained in the Fluvanna Board's Response and asked that this case be dismissed.

On July 15, 2009, Petitioner filed a Response in which he argued that the actions of the Fluvanna Circuit Court (presumably in not granting Petitioner's request for relief) are not relevant to this Petition in that this action is based on the facts that existed at the time of incorporation, April 21, 2009. Petitioner stated he is requesting a determination of whether the actions of the Clerk of the Commission regarding the issuance of a certificate conform to the law as set forth in the Virginia Water and Waste Authorities Act.

Petitioner further stated that on April 20, 2009, the issue of proper notice for the public hearing was contested in the Fluvanna County Circuit court, Case Number 09CL81. This action was filed by a group of citizens which did not include Petitioner. Petitioner states the minutes of the March 18, 2009, Fluvanna Board meeting state there was to be a "review of citizen petitions." These petitions were not rejected until April 15, 2009.<sup>4</sup>

On April 15, 2009, Petitioner states that a second petition was filed with the Circuit Court in the afternoon and also with the Fluvanna Board at the beginning of the public hearing that evening. The Fluvanna Circuit Court heard Petitioner's arguments and denied Petitioner's plea for relief.

On July 20, 2009, Petitioner submitted a Memorandum of Law Concerning Merits in which Petitioner argued the facts in this case and renewed his plea to be heard on the merits of the case.

## **Applicable Statutes**

Section 15.2-5106 provides:

The qualified voters of any locality whose governing body has not acted to create an authority under § 15.2-5102 may file with the governing body of such locality a petition asking the governing body to effect an agreement in accordance with § 15.2-5102 with the localities named in the petition. Such petition shall be signed by at least ten percent of the number of the locality's voters who voted in the last presidential election and in no case be signed by fewer than fifty voters. The petition shall ask the governing body to petition the circuit court for a referendum on the question of the creation of the authority.

If the governing body is unable, or for any reason fails, to perfect such agreement within three months of the day the petition was filed with such governing body, then the circuit court for the locality shall appoint a committee of five representative citizens of the locality to act for and in lieu of the governing body in perfecting the agreement and in petitioning for a referendum. The agreement shall not take effect unless

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<sup>4</sup> Petitioner's July 15, 2009, Response at 6.

approved in the referendum by a majority of the voters voting in the referendum.

Section 15.2-5107 provides:

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.

Section 15.2-5108 provides:

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.

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.

## **FINDING**

I find the Motion to Dismiss should be granted for the following reasons: (1) Petitioner does not have standing to challenge the Commission's actions and (2) the Commission does not have jurisdiction in this matter.

Pursuant to § 15.2-1508, the Commission has authority to determine if the articles of incorporation conform to law and if the estimated costs and rates for services of the proposed project are fair and equitable and have been advertised under § 15.2-5104. The Commission made the determinations required by law and issued a certificate of incorporation creating the JRWA on April 21, 2009. Section 15.2-5108 states that upon the issuance of a certificate, such authority shall be conclusively deemed to have been lawfully and properly created.

Section 13.1-813 of the Code of Virginia states: "[t]he Commission shall have no power to grant a hearing with respect to any certificate issued by the Commission except on a petition by a member or director, filed with the Commission and the Corporation within 30 days after the effective date of a certificate, in which the member or director asserts that the articles of corporate action contained in the articles contain a material misstatement of a material fact as to compliance with statutory requirements. . . ." Subsection C permits the Commission to act upon a petition filed by a corporation at any time to correct Commission records so as to eliminate the effect of a clerical error or filing by a person without authority.

Petitioner's contention that § 15.2-5108 somehow creates an "either-or" situation that would override § 13.1-813 with regard to standing is misguided. Section 15.2-5108 pertains to the issuance of a certificate or charter by the Commission, and § 13.1-813 determines who can challenge the issuance of a certificate by the Commission. There is no "either-or" involved with the application of the two statutes in question. Each statute is clear and unequivocal as to its purpose and application.

Petitioner's argument that the Commission did not have authority to issue the certificate of incorporation to create JRWA because the Fluvanna Circuit Court might have entered an injunction is also misguided. Petitioner took his case to the Fluvanna Circuit Court. The Court heard Petitioner's arguments and did not grant an injunction and otherwise did not grant the relief requested by Petitioner. Regardless, the Clerk of the Commission properly followed the requirements set forth in § 15.2-5108 in issuing the certificate of incorporation to JRWA.

Section 15.2-5108 states that once the Commission issues a certificate as it did on April 21, 2009, "such authority shall be conclusively deemed to have been lawfully and properly created. . . ." The American Heritage Dictionary defines the term "conclusive" as serving to put an end to doubt, question, or uncertainty; decisive.

Section 13.1-813 clearly states the Commission shall have no power to grant a hearing with respect to any certificate issued by the Commission unless a petition is filed by a member or director of the authority created. . . Petitioner is not, nor does he claim to be, a member or director of JRWA; therefore, he has no standing to bring this Petition and the Commission has no authority to grant a hearing.

Accordingly, based on the findings set forth above, **I RECOMMEND** the Commission:

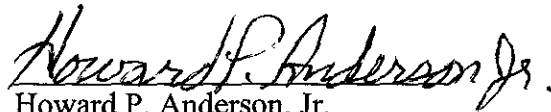
1. **ADOPT** the findings contained herein; and
2. **DISMISS** the petition.

## **COMMENTS**

The parties are advised that any comments (Section 12.1-31 of the Code of Virginia and Commission Rule 5 VAC 5-20-120 C) to this Report must be filed with the Clerk of the Commission in writing, in an original and fifteen (15) copies, within twenty-one days from the date hereof. The mailing address to which any such filing must be sent is Document Control Center, P.O. Box 2118, Richmond, Virginia 23218. Any party filing such comments shall attach a

certificate to the foot of such document certifying that copies have been mailed or delivered to all counsel of record and any such party not represented by counsel.

Respectfully submitted,

  
Howard P. Anderson, Jr.  
Hearing Examiner

Document Control Center is requested to mail a copy of the above Report to: Douglas Robert Johnson, 571 Long Acre Road, Palmyra, VA 22963; Robert L. Hodges, Esquire, McGuireWoods, One James Center, 901 East Cary St., Richmond, VA 23219-4030; Gregory Hoffman, Esquire, County Attorney for Louisa County, P.O. Box 160, Louisa, VA 23093; and Frederick W. Payne, Esquire, Fluvanna County Attorney, 414 East Jefferson St., Charlottesville, VA 22902.