

IN THE

Supreme Court of Virginia

RECORD NO. 091703

DOUGLAS ROBERT JOHNSON,

Petitioner-Appellant,

v.

VIRGINIA STATE CORPORATION COMMISSION
and
FLUVANNA COUNTY BOARD OF SUPERVISORS
and
LOUISA COUNTY BOARD OF SUPERVISORS
and
JAMES RIVER WATER AUTHORITY,

Respondents-Appellees.

**BRIEF IN OPPOSITION TO PETITION FOR APPEAL OF
RESPONDENTS FLUVANNA COUNTY BOARD OF SUPERVISORS,
LOUISA COUNTY BOARD OF SUPERVISORS
AND JAMES RIVER WATER AUTHORITY**

From the State Corporation Commission

Kurt J. Krueger
William G. Broaddus
Robert L. Hodges
McGUIREWOODS LLP
One James Center
901 East Cary Street
Richmond, Virginia 23219
Telephone: (804) 775-7513
Facsimile: (804) 698-2082
rhodges@mcquirewoods.com

*Counsel for Respondent James River
Water Authority*

Greg L. Hoffman, Esq.
Louisa County Attorney
P.O. Box 160
1 Woolfolk Avenue
Louisa, Virginia 23093
Telephone: (540) 967-3400 ext. 7582
Facsimile: (540) 967-4545
ghoffman@louisa.org

*Counsel for Respondent Louisa
County Board of Supervisors*

Frederick W. Payne
Fluvanna County Attorney
414 East Jefferson Street
Charlottesville, Virginia 22902
Telephone: (434) 977-4507
Facsimile: (434) 977-6574
fwpayne@paynehodous.com

*Counsel for Respondent Fluvanna
County Board of Supervisors*

INTRODUCTION

This is an appeal from the State Corporation Commission's grant of a certificate of incorporation to the James River Water Authority, a political subdivision of the Commonwealth created under the Virginia Water and Waste Authorities Act, Va. Code § 15.2-5100 *et seq.*, by the Counties of Fluvanna and Louisa. Respondents submit this brief in opposition pursuant to Virginia Supreme Court Rule 5:21(g) because petitioner has sought suspension of the effectiveness of the order appealed from. (See Petition, at 2).

There is no basis for suspension of the order appealed from because (1) the petitioner lacks standing to appeal in the first instance, and (2) the action of the State Corporation Commission is conclusive under the applicable statute, Va. Code § 15.2-5108. Because these factors preclude not only interlocutory relief, but any relief, respondents have moved separately to dismiss the appeal in its entirety.

COUNTERSTATEMENT OF FACTS

None of the "facts" in petitioner's Statement of Facts (see Petition, at 3-5) appear in the record except the issuance by the Commission of the

certificate of incorporation on April 21, 2009.¹ (See Petition, Statement of Facts, ¶ 19). Therefore, these allegations are to be disregarded. The burden is on the appellant to make a sufficient record for the Court. *Justus v. Young*, 202 Va. 631, 632, 119 S.E.2d 255, 257 (1961). Here, the record shows only that the Commission issued the certificate of incorporation, which is conclusive under Va. Code § 15.2-5108. The Statement of Facts contains no facts to support suspension of the effectiveness of the order appealed from. See Va.Sup.Ct.R. 5:21(g).

ARGUMENT

I. **Petitioner Lacks Standing to Challenge the Action of the State Corporation Commission in Issuing the Certificate of Incorporation to the James River Water Authority.**

Petitioner does not assert any facts or argument directed to the issue of interlocutory suspension of the order appealed from, nor does he make any argument for such relief. Instead, he relies on the merits, such as they are, of his underlying case. (See Petition, *passim*). This is plainly insufficient, because he lacks standing to appeal in the first instance.

¹ Statement of Facts, ¶ 19, also makes reference to the actions of the Boards of Supervisors of the Counties of Louisa and Fluvanna. The record with respect to the evidence of those actions is explained in the letter of the Clerk of the State Corporation Commission of August 21, 2009, transmitting the record.

In *Morrisette v. McGinniss*, 246 Va. 378, 382, 378 S.E.2d 433, 435 (1993), the Supreme Court held that neither mandamus nor injunction would lie where the Commission's action pursuant to the predecessor statute to Va. Code § 15.2-5108 "was unchallenged and became final." In that case, the Court observed, the Authority was "... conclusively deemed to have been lawfully and properly created and established and authorized to exercise its powers." See *id.* (citing Va. Code § 15.1-1246 (now codified as Va. Code § 15.2-5108)). The Court held that "no subsequent act of the Registrar or the County Board could affect the force of the Commission's order or undo the creation of the Authority once the conclusive presumption of § 15.1-1246 attached." *Id.*

The threshold question here is, under the decision in *Morrisette*, *supra*, where the County Boards that created the Authority could not affect the force of the Commission's order, can a "resident and registered voter" (see Petition, at 2), nevertheless do so?

No provision of law authorizes an appeal by a private citizen from the Commission's issuance of a certificate of incorporation to an Authority under the Water and Waste Authorities Act. In fact, as the Court held in *Morrisette*, once the Commission has issued the certificate, even the

County Board that created the Authority lacked the power to challenge the Commission's order. *Morrisette*, 246 Va. at 382, 378 S.E.2d at 435.

Nor is the petitioner here a "person aggrieved" for the purposes of appeal to this Court. See Va. Code § 12.1-39. "Person aggrieved" for the purposes of standing to appeal means that the individual must have a direct interest in the subject matter of the proceeding. An indirect interest solely as a resident and taxpayer is insufficient. *Nicholas v. Lawrence*, 161 Va. 589, 592-93, 171 S.E.2d 673, 674 (1933). Here, the interest of petitioner is "that of any other taxpayer or resident," *id.*, see also Petition, at 2, which is inadequate to confer standing to appeal.

He also does not fall within the scope of Va. Code § 12.1-39, defining persons permitted to appeal decisions of the Commission to this Court. See *id.* ("The Commonwealth, any party in interest, or any party aggrieved by any final finding, decision settling the substantive law, order, or judgment of the Commission shall have, of right, an appeal to the Supreme Court..."). See also *Harbor Cruises, Inc. v. State Corp. Comm'n*, 219 Va. 675, 676, 250 S.E.2d 347, 348 (1979) (appealing party from a judgment of the Commission must show an immediate, pecuniary and substantial interest in the litigation, and not a remote or indirect interest). "He must also show that he has been aggrieved by the judgment or decree appealed from. He

