

IN THE  
SUPREME COURT OF VIRGINIA

|   |   |                   |
|---|---|-------------------|
| DOUGLAS ROBERT JOHNSON                      | ) |                   |
|   | ) | RECORD NO. 091703 |
| v.  | ) | (S.C.C. CASE NO.  |
|   | ) | CLK-2009-00014)   |
|   | ) |                   |
| STATE CORPORATION COMMISSION, <u>et al.</u> | ) |                   |
| Appellees.                                  | ) |                   |

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STATE CORPORATION COMMISSION'S RESPONSE TO MOTION TO  
DISMISS APPEAL AND DESIGNATION OF ADDITIONAL CONTENTS OF  
APPENDIX

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Comes now the Virginia State Corporation Commission ("Commission"), by counsel, pursuant to Rule 5:4, Rules of the Supreme Court of Virginia ("Rules"), and submits the following response to the Motion to Dismiss Appeal filed by the other Appellees in this matter, as well as the Commission's Designation of Additional Contents of Appendix:

1. On May 8, 2009, Appellant filed his Notice of Appeal of the Final Order in Commission Case No. CLK-2009-00014.

2. On August 21, 2009, the Clerk of the Commission submitted the record in Case No. CLK-2009-00014, which included the following documents: (1) a letter to the Clerk of the Commission from Hoffman re: Articles of Incorporation of the James River Water Authority; (2) Expedited Service Request Form; (3) Commission Order Issuing Certificate of Incorporation; (4) Articles of Incorporation; (5) Notice of Appeal of Douglas R. Johnson; and (6) Certificate.

3. On September 10, 2009, without conceding that such documents were part of the record in Case No. CLK-2009-00014, at Appellant's request, the Clerk of the Commission supplemented the record with the following documents: (1) letter to the Clerk of the Commission from Appellant dated April 17, 2009, with attachments; (2) a complaint filed on April 20, 2009 in Case 09CL81 in the Fluvanna County Circuit Court; and (3) a Motion for Temporary Injunction against the Fluvanna County Board of Supervisors, filed April 20, 2009, in Case 09CL81 in the Fluvanna County Circuit Court.

4. The Clerk of this Court issued a certificate of appeal on October 13, 2009. A copy of that certificate is attached hereto as Exhibit 1.

5. On November 2, 2009, the other Appellees filed a Motion to Dismiss Appeal based on: (1) Appellant's failure to post an appeal bond

with the Clerk of the Commission; and (2) failure to file assignments of error with this Court.

7. A condition of the issuance of the certificate of appeal was that Appellee post a \$500 appeal bond within ten (10) days. One of the stated bases for the Motion to Dismiss was that no appeal bond had been secured by the deadline. However, Commission records show that an appeal bond was filed on October 23, 2009. A copy of that bond is attached hereto as Exhibit 2.

8. The other stated basis for the Motion to Dismiss was that Appellant failed to file his assignments of error, in accordance with Rule 5:21(i), which requires that an Appellant file his assignments of error setting forth the specific bases for his appeal within ten (10) days of the issuance of the certificate of appeal. Rule 5:21(i) states:

Only errors so assigned will be noticed by this Court and no error not so assigned will be admitted as the ground for reversal of the decision below.

The time for filing prescribed by the Supreme Court is jurisdictional and mandatory, and failure to comply is fatal to an appeal. Thrasher v. Burlage, 219 Va. 1007, 1010, 254 S.E.2d 64 (1979) and Vaughan v. Miller, 215 Va. 323, 324, 210 S.E.2d 139 (1974). This Court has previously held under circumstances similar to those in the instant case that an appeal

must be dismissed when assignments of error are filed outside the prescribed ten (10) day deadline. Chincoteague Bay Trails End Assn, Inc. v. Trail's End Utility Co., Inc. and State Corporation Commission, Record No. 831856 (Va. 1984), S.C.C. Case No. PUE820065, and Langdon v. State Corporation Commission and Chesapeake and Potomac Telephone Company of Virginia, Record No. 770834 (Va. 1979), S.C.C. Case No. 19696. In those cases, the assignments of error were filed, but were not filed within the time frame prescribed by Rule; yet even that failure necessitated dismissal of the appeal. In this case, the assignments of error were due on October 23, 2009. As of today's date, assignments of error have not yet been filed.

9. In Harlow v. Commonwealth, 195 Va. 269, 271 (1953), 77

S.E.2d 851, the Court stated that:

The purpose of assignments of error is to point out the errors with reasonable certainty in order to direct this court and opposing counsel to the points on which appellant intends to ask a reversal of the judgment, and to limit discussion to these points. Without such assignment, appellee would be unable to prepare an effective brief in opposition to the granting of an appeal, to determine the material portions of the record to designate for printing, to assure himself of the correctness of the record while it is in the clerk's office, or to file... assignments of cross-error.

It is for precisely this reason that the Appellees have been unable to respond to Appellant's Motion to Expand the Record and List of Exhibits. Without assignments of error, none of the Appellees can appropriately respond to this motion or prepare arguments on the merits of the appeal.

10. Without waiving the foregoing argument, the Commission, pursuant to Rule 5:21(j), notifies this Court that it has no additional contents to designate as part of the appendix, beyond what was included in the record that was submitted to this Court on August 21, 2009.

Prayer for Relief

ACCORDINGLY, Appellee State Corporation Commission hereby respectfully requests that the Court dismiss this appeal against all Appellees for lack of jurisdiction.

