

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE APPLICATION OF KENTUCKY-AMERICAN )  
WATER COMPANY FOR A CERTIFICATE OF PUBLIC )  
CONVENIENCE AND NECESSITY AUTHORIZING THE )  
CONSTRUCTION OF APPROXIMATELY 49,000 FEET ) CASE NO. 91-359  
OF 12" MAIN, 240 FEET OF 8" MAIN, WITH )  
ASSOCIATED VALVES AND FITTINGS, KNOWN AS )  
THE "JACKS CREEK PIPELINE" )

O R D E R

On December 23, 1991, Lexington-South Elkhorn Water District, Jessamine County Water District No. 1, and Spears Water Company (hereinafter referred to collectively as "Intervenors") filed a joint motion requesting that Kentucky-American's certificate case be held in abeyance pending the outcome of a complaint filed in federal court on or about December 20, 1991. The motion claims that a favorable decision is expected from the federal court and the result of such a decision will render the Commission proceeding unnecessary and any Commission decision unenforceable.

The federal lawsuit, filed by the two water districts but not Spears Water Company, alleges that Kentucky-American's acquisition of right-of-ways in Jessamine County and its willingness to provide retail water service to anyone not currently receiving water service, amounts to a violation of 7 U.S.C. §1926(b) of the Consolidated Farm and Rural Development Act. This statute authorizes the Farmers Home Administration to make loans to nonprofit rural water associations and districts for the

construction of water systems, and provides in Section 1926(b) as follows:

The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

The water districts allege in their federal complaint that their water service will be limited as a result of Kentucky-American's willingness to serve new customers, and that this, in turn, will compromise the Districts' ability to repay their loans from the Farmers Home.

On January 3, 1992, Kentucky-American filed a response in opposition to abating the certificate proceeding. Kentucky-American states that since the statute prohibits the curtailment or limitation of service provided by a water district, there is no literal violation of the statute because Kentucky-American will not be competing for existing water customers. Kentucky-American further claims that neither water district has any claim of right to serve new customers merely because such customers are in the vicinity of the water districts' facilities.

Kentucky-American further states that while neither the Commission's statutes nor regulations provide specific guidelines for abating a pending case, Kentucky's highest court establish such equitable principles in Finger v. Tate, Ky., 138 S.W.2d 978 (1940). In that case, the Court stated that, "[T]he two actions

must not only be pending at the same time, and prosecuted at the time the objection is made, and both be pending between the same parties, but they must both be prosecuted for identically the same cause of action." Finger at 980. When these requisite conditions are met, the Court is inclined to abate the subsequent action pending a decision in the prior one. In the pending controversy, the federal complaint is the subsequent action; the Commission case being the prior one.

Kentucky-American also argues that abatement is inappropriate because only the Commission has the authority to issue a certificate of convenience and necessity for construction of utility facilities and that since Kentucky-American has proposed five separate routes for its transmission line, the Commission can select one that lies outside the service areas of either water district.

Based on the motion and response, and being advised, the Commission hereby finds that the action pending in federal court involves the authority of a private water utility to serve customers located within the boundary of a water district; whereas the action pending before this agency involves a utility's need to construct transmission facilities to maintain and upgrade service. The issue before the Commission, therefore, is separate and distinct from the issues presented in the complaint filed in federal court which relate to what rights Kentucky-American may or may not have regarding the distribution of water to retail customers. Any decision by the federal court will not directly

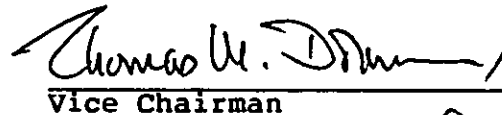
impact the Commission's decision herein. Therefore, the motion to abate should be denied.

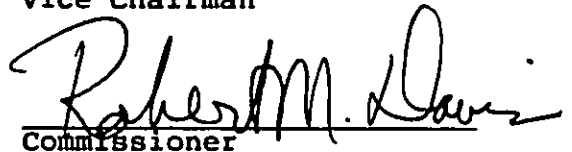
IT IS THEREFORE ORDERED that the motion to abate be and it hereby is denied.

Done at Frankfort, Kentucky, this 9th day of January, 1992.

PUBLIC SERVICE COMMISSION

  
Chairman

  
Vice Chairman

  
Commissioner

ATTEST:

  
Executive Director