

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF KENTUCKY-AMERICAN WATER)	
COMPANY FOR A CERTIFICATE OF PUBLIC)	
CONVENIENCE AND NECESSITY AUTHORIZING)	
THE CONSTRUCTION OF APPROXIMATELY)	CASE NO. 91-359
49,000 FEET OF 24" MAIN, 400 FEET OF)	
12" MAIN, 240 FEET OF 8" MAIN, WITH)	
ASSOCIATED VALVES AND FITTINGS, KNOWN)	
AS THE "JACK'S CREEK PIPELINE")	

O R D E R

On September 30, 1991, Kentucky-American Water Company ("Kentucky-American") filed an application for a Certificate of Public Convenience and Necessity to construct a \$3,237,000 water-works improvement project. Kentucky-American proposes to finance the construction initially through short-term bank borrowings. After construction is complete, the costs will be converted to permanent financing. The proposed construction, commonly referred to as the "Jack's Creek Pipeline," will provide additional water transmission facilities in the southwestern part of Kentucky-American's service area.

The proposed route is through southern Fayette County and northern Jessamine County. Drawings and specifications for the proposed improvements were prepared by the American Water Works Service Company, Inc. of Voorhees, New Jersey, and William H. Finnie & Associates, of Lexington, Kentucky, and have been approved by the Division of Water of the Natural Resources and Environmental Protection Cabinet.

A hearing was held on April 1, 1992 at the Commission's offices in Frankfort, Kentucky. Spears Water Company ("Spears"), Lexington-South Elkhorn Water District ("Lexington-South Elkhorn"), Jessamine County Water District No. 1 ("Jessamine No. 1"), and the city of Nicholasville ("Nicholasville") intervened and participated in this matter. These parties are collectively referred to as the "Intervenors."

DISCUSSION

Kentucky-American has proposed to construct a 24-inch water transmission line to run from an existing 30-inch high service line in Fayette County near Jacks Creek Road, westerly through Fayette County along Shelby Lane and Delong Road, into Jessamine County roughly parallel to the Fayette/Jessamine County line, and then in a northerly direction connecting to Kentucky-American's existing water system at U.S. 27 in Fayette County. This route is referred to by Kentucky-American in its application as Route A.

Kentucky-American's application also included detailed information on four alternative pipeline routes, designated Routes B through E, for the Commission's consideration. Kentucky-American bid eight separate pipeline sections which, in various combinations, would allow the five different routes discussed in its application for the Jack's Creek Pipeline. Routes B through E are located totally in Fayette County. Route A, which is located in both Fayette and Jessamine counties, was selected and recommended by Kentucky-American as the most feasible and least expensive to construct as well as minimizing conflicts and disturbances to property owners and the general public.

The proposed construction is classified as transmission facilities and was designed for the purpose of moving large quantities of treated water from Kentucky-American's source of supply to where it is needed for distribution. Kentucky-American also stated that the proposed construction is necessary to reinforce its water system. The proposed transmission facilities will allow the system to operate at higher and more stable pressures during peak demands, will allow more effective utilization of system storage, and lower head losses in the areas to be served by the proposed facilities.

None of the Intervenor's challenged Kentucky-American's need for increased water quantities and pressures in South West Fayette County. However, the Intervenor's did suggest two alternative transmission lines that were represented as being sufficient to satisfy Kentucky-American's needs. These two alternatives were challenged by Kentucky-American as producing an inefficient underutilization of the treatment capacity at its Kentucky River Station and a physically impossible overutilization of capacity at its Richmond Road Station.

The Intervenor's specifically opposed Route A due to their concerns that the existence of a water transmission line within Jessamine County would enable Kentucky-American to compete for existing and new retail water customers. Evidence was presented by the Intervenor's to support their position that retail competition would have an adverse financial impact on their respective operations due to their significant capital investment in water facilities. In response to a federal lawsuit filed by

Lexington-South Elkhorn and Jessamine No. 1, Kentucky-American stated in this case that it would not serve any customers at retail within the established boundaries of Lexington-South Elkhorn or Jessamine No. 1 as long as they had outstanding Farmers Home Administration financings. Kentucky-American did offer to sell water or fire protection service to Lexington-South Elkhorn or Jessamine No. 1 for their resale to retail customers.

Kentucky-American further maintained that since Spears did not have a defined service territory, retail competition for Spears' customers should not be discouraged. Spears stated that it currently has an outstanding five year bank note that was personally co-signed by its shareholders, the repayment of which will be in jeopardy if customers are lost to Kentucky-American. Nonetheless, pursuant to KRS Chapter 278, Spears nor Kentucky-American have defined service territories and the Commission is without any statutory authority to in effect create such defined service territories.

The Commission, having reviewed the evidence of record and being otherwise sufficiently advised, finds that:

1. Public convenience and necessity require the construction of Route A as proposed in the application. Route A is the most feasible and least costly alternative available for Kentucky-American to satisfy the demands of its customers.

2. The two alternative construction projects suggested by the Intervenor will not adequately meet the needs of Kentucky-American's customers in an efficient, cost effective manner.

3. Construction of Route A will consist of the installation of approximately 9.4 miles of 24-, 12-, and 8-inch diameter pipeline and related appurtenances. Based on the low bids submitted and after allowances are made for fees, contingencies, and other indirect costs, the total project is estimated to cost \$3,237,000.

4. Kentucky-American should obtain approval from the Commission prior to performing any additional construction not expressly certificated by this Order.

5. Any deviation from the construction approved should be undertaken only with the prior approval of the Commission.

6. Kentucky-American should furnish duly verified documentation of the total costs of this project, including the cost of construction and all other capitalized costs (engineering, legal, administrative, etc.), within 60 days of the date that construction is substantially completed. Said construction costs should be classified into appropriate plant accounts in accordance with the Uniform System of Accounts for Water Utilities prescribed by the Commission.

7. Kentucky-American should require the provision of full-time resident inspection under the general supervision of a professional engineer with a Kentucky registration in civil or mechanical engineering, to ensure that the construction work is done in accordance with the contract drawings and specifications and in conformance with the best practices of the construction trades involved in the project.

8. Kentucky-American should furnish within 60 days of the date of substantial completion of this construction a copy of the

"as-built" drawings and a signed statement that the construction has been satisfactorily completed in accordance with the contract plans and specifications.


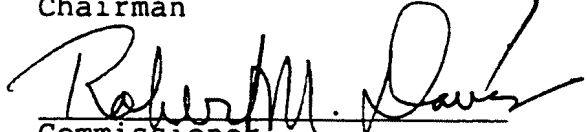
IT IS THEREFORE ORDERED that:

1. Kentucky-American be and it hereby is granted a Certificate of Public Convenience and Necessity to proceed with the proposed construction of Route A of the Jack's Creek Pipeline as set forth in the drawings and specifications of record herein.

2. Kentucky-American shall comply with all matters set out in Findings 4 through 8 as if the same were individually so ordered.

Done at Frankfort, Kentucky, this 17th day of April, 1992.

PUBLIC SERVICE COMMISSION


Chairman

Commissioner

DISSENTING OPINION OF VICE CHAIRMAN THOMAS M. DORMAN

I respectfully dissent from the majority opinion to the extent certain conditions in the public interest should be placed upon Kentucky-American's ability to offer service to any existing customer of Spears. Kentucky-American, in response to a federal lawsuit filed by Lexington-South Elkhorn and Jessamine No. 1, has stated that it would comply with federal law to not serve any

retail customers within the established boundaries of Lexington-South Elkhorn or Jessamine No. 1 as long as these entities had outstanding loans from the Farmers Home Administration. Spears does not enjoy the protection of federal law. While Spears does not have a defined service territory, Spears does currently have an outstanding five year bank note that was personally cosigned by its shareholders, the repayment of which will be jeopardized by the loss of customers to Kentucky-American.¹ The erosion of Spears customer base will precipitate higher rates for the remaining customers not offered service by Kentucky-American because of the need to spread Spears fixed costs over a smaller customer base.

The Commission has a statutory duty when ruling upon certificates of convenience and necessity to protect the public interest. This duty encompasses not only the applicant's customers but any utility's customers which may be impacted by the Commission's ruling. "[I]t is the duty of the Public Service Commission to prevent ruinous competition. . ." City of Cold Spring v. Campbell County Water District, Ky., 334 S.W.2d 269, 272 (1960), overruled on other grounds. In granting the Certificate of Public Convenience and Necessity, the Commission must find that there is both a need for the proposed transmission line to meet

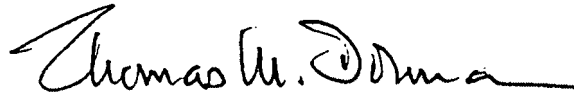
¹ Spears Water Company, Inc.'s Annual Report, year ending December 31, 1991, page 21, Farmers Bank, Mortgage Loan issued 12/91, matures 11/96, principle per balance sheet date, \$270,000.

customers' service demands as well as an absence of wasteful duplication. In considering the question of duplication, it is appropriate to consider possible increased cost to the remaining customers of Spears who might be compelled to pay higher rates as a result of the loss of Spears' customer base. Kentucky Utilities Company v. Public Service Commission, Ky.App., 252 S.W.2d 885, 891 (1952).

Kentucky-American's proposed water transmission line will provide additional water transmission facilities in the southwestern part of Kentucky-American's service area and is necessary. If used strictly for transmission and to provide services not otherwise available in the area, there is an absence of wasteful duplication. However, Kentucky-American has stated that it would serve customers of Spears by using the proposed transmission line in part for distribution. The Certificate of Public Convenience and Necessity should be granted to allow the proposed construction of Route A. However, Kentucky-American should be restricted from providing retail water service to any current customer of Spears until after payment of Spears' existing note which represents Spears capital investment in its water facilities less the amount of that note which was used for payment of the reacquired capital stock in the amount of \$130,680 as indicated in Spears' Annual Report.² Kentucky-American should be

² Id., page 9, Comparative Balance Sheet-Equity Capital and Liabilities, Account No. 216.

allowed to provide fire protection to any customer of Spears, a service Spears cannot now provide, and to provide retail water service to any customer not currently being served by Spears. This time limited restriction upon Kentucky-American's ability to serve Spears' current customers will protect those customers of Spears who will not be offered service by Kentucky-American from unreasonably and unnecessarily high rate increases.



Thomas M. Dorman
Vice Chairman
Kentucky Public Service Commission

ATTEST:

Executive Director

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF KENTUCKY-AMERICAN WATER)	
COMPANY FOR A CERTIFICATE OF PUBLIC)	
CONVENIENCE AND NECESSITY AUTHORIZING)	
THE CONSTRUCTION OF APPROXIMATELY)	CASE NO. 91-359
49,000 FEET OF 24" MAIN, 400 FEET OF)	
12" MAIN, 240 FEET OF 8" MAIN, WITH)	
ASSOCIATED VALVES AND FITTINGS, KNOWN)	
AS THE "JACK'S CREEK PIPELINE")	

O R D E R

On May 6, 1992, Jessamine County Water District No. 1 ("Jessamine No. 1"), Lexington-South Elkhorn Water District ("Lexington-South Elkhorn"), Spears Water Company ("Spears") and the City of Nicholasville (collectively referred to as "Intervenors") filed a petition for rehearing of the Commission's April 17, 1992 Order granting Kentucky-American Water a certificate to construct the Jack's Creek pipeline in Jessamine County along Route A. The petition alleges two grounds: (1) a certificate to construct Route A is barred by principles of res judicata due to the Commission's prior Order dated March 27, 1991 in Case No. 90-249¹ denying such a certificate; and (2) the April 17, 1992 Order lacks specific findings that construction of Route A will result in an absence of wasteful duplication of facilities.

¹ Case No. 90-249, Application of Kentucky-American Water Company for a Certificate of Public Convenience and Necessity Authorizing the Construction of Approximately 51,900 Feet of 24" Main, 3,250 Feet of 12" Main, with Associated Valves and Fittings, Known as the "Jack's Creek Pipeline."

The Intervenors urge the Commission to reconsider its decision in light of the Dissenting Opinion of Vice Chairman Thomas M. Dorman and request that Kentucky-American be restricted from providing water service within the areas of Route A, at least until the retirement of Spears' debt. In support of this argument, the Intervenors have attached a number of exhibits to their petition for rehearing. Except for Exhibit A, which is an excerpt from a prior Commission Order, the other exhibits do not qualify under KRS 278.400 as newly discovered evidence and thus cannot be considered on rehearing.

The Commission finds no merit in the Intervenors' request for economic protectionism until Spears has retired its present debt. The debt discussed in the Dissenting Opinion and the petition for rehearing is the type that cannot be issued absent our prior approval under KRS 278.300. The purpose of this approval process is to ensure that such debt is for a lawful object within the corporate purposes of the utility and is reasonably necessary and appropriate. Taking administrative notice of our records, we find that Spears has neither requested nor been granted approval to issue the referenced debt. We note that this is not the first time that Spears has failed to comply with KRS 278.300.² Having so failed to receive the requisite prior approval, this debt should not be considered as a basis for the requested economic protectionism.

² See, Case No. 9067, An Adjustment of Rates of the Spears Water Company, Inc., 104 Maple Street, Nicholasville, Kentucky, 40356.

As to the res judicata issue, the intervenor previously raised the identical argument in a motion to dismiss filed on January 21, 1992. In denying that motion the Commission stated in its January 31, 1992 Order that the certificate was denied in Case No. 90-249 because Kentucky-American failed to refute evidence that there was an alternate route that was shorter and less expensive. However, in denying Kentucky-American's request for rehearing to keep the record in that case open for addition evidence on alternatives routes, the Commission directed such new evidence to be filed in a new certificate case. Consequently, Kentucky-American followed the exact procedure established by the Commission for a review of the alternative routes.

In addition, the evidence in Case No. 90-249 on the cost of the alternative route consisted solely of an extrapolation based on the cost of Route A. In this case, Kentucky-American presented detailed cost estimates, supported by contractor bids, for each of the alternative routes. This evidence demonstrates that all the alternative routes are more expensive, not less expensive, than Route A. Rehearing should be denied on this issue.

On the wasteful duplication issue, the April 17, 1992 Order discussed the two alternative transmission lines that were suggested by the Intervenors and Kentucky-American's criticism of those lines. Further, the Order stated that, "Route A is the most feasible and least costly alternative for Kentucky-American to satisfy the demands of its customers." Implicit in this finding of least cost for Route A is the absence of wasteful duplication. However, being presented with this opportunity to modify our April

17, 1992 Order, the Commission will grant a rehearing to make the following additional findings based on the existing evidence of record.

There currently exists no transmission facilities that are capable of satisfying Kentucky-American's needs for increased water quantities and pressure in the southwest portion of its service territory. None of the Intervenor's challenged Kentucky-American's need for additional service facilities and the Commission finds that additional facilities are needed.

The two alternative transmission lines proposed by the Intervenor's are not feasible on an engineering basis and thus cannot be considered as viable alternatives to meet Kentucky-American's service needs.

Kentucky-American's proposed Routes B through E, while shorter in length than Route A, are more expensive by at least \$223,000. There are no alternative facilities that could be installed at a lower cost or that would produce greater efficiencies and still adequately satisfy Kentucky-American's service needs. Although Route A is longer in length than proposed Routes B through E, Route A will result in a minimization of investment while achieving the greatest degree of efficiency. In addition to allowing Kentucky-American to correct its service deficiencies, Route A will enable a significant area of southern Fayette County and northern Jessamine County to receive fire protection service, a valuable utility service which no other water purveyors have the ability to provide.

Construction of Route A will create no duplication of existing water transmission facilities. While there is a potential that Route A could, in the future, result in some duplication of distribution facilities, this factor must be weighed against the additional investment of at least \$223,000 to be borne by Kentucky-American's customers if the pipeline is constructed on an alternative route. Since the legislature has not seen fit to grant either water districts or private water companies exclusive service territories, the potential for competition and duplication of distribution facilities exists irrespective of the route selected for the proposed transmission line.

Despite the potential for duplication of distribution facilities, Kentucky-American has stated that it will not serve any customer within the territorial boundary of Jessamine No. 1 as long as the district has outstanding financing secured from or guaranteed by the Farmers Home Administration. This commitment by Kentucky-American also extends to Lexington-South Elkhorn even though none of the proposed transmission facilities will lie within that district's boundary. With respect to Spears, Kentucky-American has stated that it will not solicit any existing customers of Spears.

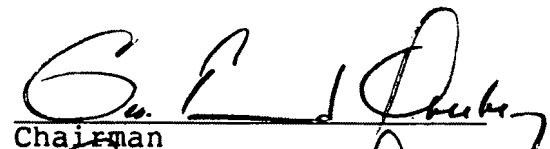
The current known savings of \$223,000 to Kentucky-American's ratepayers under Route A outweigh the speculative harm to the Intervenor due to the mere potential for duplicate distribution facilities in the indefinite future. Under the circumstances of this case, construction of Route A will neither result in an

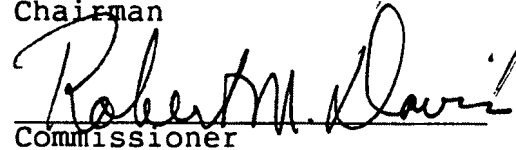
excessive investment in relation to efficiency nor a multiplicity of physical properties. Thus, there is an absence of wasteful duplication and a need for Kentucky-American to construct a pipeline on Route A.

IT IS THEREFORE ORDERED that the Intervenor's petition for rehearing be and it hereby is granted for the sole purpose of modifying the April 17, 1992 Order as provided in the findings set forth above.

Done at Frankfort, Kentucky, this 26th day of May, 1992.

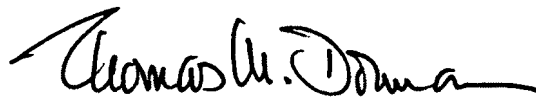
PUBLIC SERVICE COMMISSION


Chairman


Commissioner

DISSENT OF VICE CHAIRMAN THOMAS M. DORMAN

I reaffirm my previous dissent in the Commission Order dated April 17, 1992.



Thomas M. Dorman
Vice Chairman
Kentucky Public Service Commission

ATTEST:


Executive Director, Acting

RECEIVED

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
CIVIL ACTION NO. 92-CI-00851
DIVISION I

MAR 10 1993

PUBLIC SERVICE
COMMISSION

SPEARS WATER COMPANY, INC.,
JESSAMINE COUNTY WATER DISTRICT NO. 1,
LEXINGTON-SOUTH ELKHORN WATER DISTRICT,
and CITY OF NICHOLASVILLE

PLAINTIFFS

ENTERED

VS.

OPINION

MAR 9 1993

KENTUCKY PUBLIC SERVICE COMMISSION
and KENTUCKY-AMERICAN WATER COMPANY

FRANKLIN CIRCUIT COURT
JANICE MARSHALL, CLERK
DEFENDANTS

** ** *

This is an appeal from an Order of the Kentucky Public Service Commission ("Commission") dated April 17, 1992, wherein Kentucky-American Water Company ("Kentucky-American") was granted a Certificate of Convenience and Necessity to construct a pipeline known as the "Jacks Creek Pipeline" and an Order dated May 26, 1992, wherein the April 17, 1992, Order was modified to include additional findings of fact. Spears Water Company, Inc., Jessamine County Water District No. 1, Lexington-South Elkhorn Water District and the City of Nicholasville (collectively referred to as "Plaintiffs") seek herein a reversal of the orders arguing that: (a) the Commission violated KRS 278.400, (b) the Commission denied Plaintiffs due process of law, (c) the orders are violative of res judicata, and (d) the Commission arbitrarily found that the proposed Jacks Creek Pipeline was not a duplication of facilities.

The orders must be upheld unless this Court finds them to be unlawful or unreasonable. KRS 278.410(1). An order is unlawful if it violates a state or federal statute or constitution. An order is unreasonable "only when it is determined that the evidence

presented leaves no room for difference of opinion among reasonable minds." Energy Regulatory Commission v. Kentucky Power Co., Ky. App., 605 S.W.2d 46, 50 (1980), citing Thurman v. Meridian Mutual Insurance Co., Ky., 345 S.W.2d 635 (1961). Plaintiffs bear the burden of proof to show by clear and satisfactory evidence that the Order is unreasonable or unlawful. KRS 278.430. An order may also be set aside if it is found to be arbitrary. American Beauty Homes Corp. v. Louisville and Jefferson County Planning Commission, Ky., 379 S.W.2d 450, 456 (1964). Arbitrary mean clearly erroneous, unsupported by substantial evidence. Thurman v. Meridian Mutual Insurance Co., Ky., 345 S.W.2d 635, 639 (1961). The Court finds that the Plaintiffs have failed to meet their burden of proof with regard to all four issues raised in this appeal.

A. KRS 278.400

Plaintiffs' first challenge alleges a violation of KRS 278.400. The Commission granted Kentucky-American's Application for Certificate of Convenience and Necessity on April 17, 1992, following a full evidentiary hearing held on April 1, 1992. Thereafter, Plaintiffs sought a rehearing and reconsideration in part on the ground that the Commission had failed to make any findings of fact to support its ruling that the proposed pipeline did not constitute wasteful duplication. In response to the motion for a rehearing and reconsideration, the Commission entered the May 26, 1992, Order wherein it recited the findings of fact on the issue of wasteful duplication which were contained in the April 17, 1992, Order and thereafter made additional findings to support its

ruling that there was no wasteful duplication. This Court finds no error in the Commission's decision to not hold a second hearing prior to its entering the May 26, 1992, Order.

The May 26, 1992, Order does not fall within the scope of the provisions of KRS 278.400. Its purpose was not to address "additional evidence that could not with reasonable diligence have been offered" in the April 1, 1993, hearing as contemplated in KRS 278.400. Instead, the Order was in response to Plaintiffs' challenge of alleged deficiencies in the April 17, 1992, Order. KRS 278.400 does not entitle Plaintiffs to a second evidentiary hearing to present an argument that an order entered by the Commission lacked sufficient findings of fact.

Additionally, the Commission, had authority to amend its April 17, 1992, Order to include additional findings of fact based upon the record. The Commission derives its authority to amend its orders from KRS 278.390. This statute has been construed by the courts to provide that the Commission retains the authority to modify its orders until they are suspended or vacated by a court of competent jurisdiction. Mike Little Gas Co. v. Public Service Commission, Ky. App., 574 S.W.2d 926, 927 (1978). As long as the Commission had not lost jurisdiction over the matter, it may reconsider and change its orders. Union Light Heat and Power Co. v. Public Service Commission, Ky., 271 S.W. 2d 261, 365-366 (1954).

An amendment of the Commission's orders pursuant to KRS 278.390 does not necessarily require a hearing. Mike Little Gas Co. v. Public Service Commission, Ky. App., 574 S.W.2d 926, 927

(1978). As long as additional findings are based on the record, there is neither a statutory right nor a need for a second evidentiary hearing. The, Plaintiffs have failed to establish by clear and satisfactory evidence that the Commission's May 26, 1992, Order was unlawful or unreasonable because of the Commission's failure to comply with KRS 278.400.

B. DUE PROCESS

Plaintiffs' second challenge asserts a violation of due process of law. They contend that they were denied the opportunity to be heard on the question of whether the Commission's April 17, 1992, Order contained sufficient findings of fact on the issue of wasteful duplication. Due process entitles Plaintiffs to the right to know what evidence was being considered by the Commission and the opportunity to test, explain, or refute such evidence. Utility Regulatory Commission v. Kentucky Water Service Co., Ky. App., 642 S.W.2d 591, 593 (1982). This Court has examined the transcript of the April 1, 1992, hearing before the Commission and finds that Plaintiffs were indeed afforded due process.

Plaintiffs were granted the opportunity to be heard on the merits of the controversy before the Commission. They were present at the April 1, 1992, evidentiary hearing wherein Kentucky-American's evidence was heard by the Commission. Plaintiffs cross-examined Kentucky-American's witnesses concerning the question of wasteful duplication and presented their own evidence in this regard. The April 1, 1992, hearing meets all the requirements of due process of law.

Having once been heard on the issue of wasteful duplication, Plaintiffs were not entitled to a second hearing on the issue of whether the Commission's April 17, 1992, Order contained any findings of fact on the issue of wasteful duplication. Due process of law simply does not guarantee more than one hearing. Black v. York, 300 Ky. 166, 189 S.W.2d 599, 600 (1945). Accordingly, Plaintiffs have failed to establish that the May 26, 1992, Order was unlawful and therefore violative of a statute or constitutional guarantee.

C. RES JUDICATA

Plaintiffs' third challenge is on the grounds of res judicata. Plaintiffs contend that the Application for Certificate of Convenience and Necessity should have been denied by the Commission because of the Commission's prior ruling in Case No. 90-249. The Court finds a substantial change in circumstances between the two Commission proceedings and, accordingly, finds that the doctrine of res judicata is not applicable.

The Commission rejected Kentucky-American's initial Application for Certificate of Convenience and Necessity in PSC Case No. 90-249 citing a deficiency in Kentucky-American's evidence about the cost of alternative routes for the pipeline. The Commission rejected Kentucky-American's request to cure the evidentiary deficiency in PSC Case No. 90-249, but instructed Kentucky-American that it could be cured by filing a second application. The Commission further instructed Kentucky-American that, if it wished to file a second application, it must provide

the Commission with "new evidence relating to the relocation of the proposed facilities." The new evidence was presented by Kentucky-American in the subsequent proceeding from which this appeal has been brought. Clearly, res judicata does not apply to these circumstances. See Bank of Shelbyville v. Peoples Bank of Bagdad, Ky., 551 S.W.2d 234, 235 (1977); Dink v. Palmer-Ball, Ky., 479 S.W.2d 897, 899 (1972). Plaintiffs' res judicata argument does not establish that the Commission's April 17, 1992 and May 26, 1992, orders were unlawful or unreasonable.

D. WASTEFUL DUPLICATION

Plaintiffs' final challenge is the Commission's failure to find that the proposed pipeline constitutes wasteful duplication of facilities. This Court's review of the record reveals that Plaintiffs did not establish by clear and satisfactory evidence that it was unlawful or unreasonable for the Commission to find that the proposed Jacks Creek Pipeline does not constitute wasteful duplication of facilities as that phrase has been defined in this jurisdiction. Kentucky Utilities Co v. Public Service Commission, Ky., 390 S.W.2d 168, 173 (1965) (an excess capacity over need, an excess investment in relation to productivity or efficiency, or an unnecessary multiplicity of physical properties).

First, Plaintiffs did not introduce any evidence before the Commission that the capacity to be provided by the Jacks Creek Pipeline exceeded the capacity needed to serve the Kentucky-American customers. Plaintiffs did not challenge Kentucky-American's evidence that the capacity of its existing pipeline is

fully utilized or that the proposed pipeline is needed in order for Kentucky-American to serve its customers. Second, Plaintiffs did not establish that Kentucky-American's investment in the proposed pipeline is excessive in relation to its efficiency. Plaintiffs' contentions in this regard were disproved by evidence that the two alternative routes which they proposed would not enable Kentucky-American to meet the hydraulic requirements necessary to serve its customers. Finally, Plaintiffs did not establish that the Jacks Creek Pipeline would result in an unnecessary multiplication of physical facilities. There is no evidence of any existing facility which can provide Kentucky American with the highspeed, bulk water transfer capacity it requires to serve its customers. There therefore can be no duplication. See City of Covington v. Board of Commissioners of Kentucky County Water District No. 1, Ky., 371 S.W. 2d 20, 23, (1962) (overruled on other grounds) ("[T]here can be no duplication unless the existing facility is reasonably available for the present and future needs of those who will be served by it".).

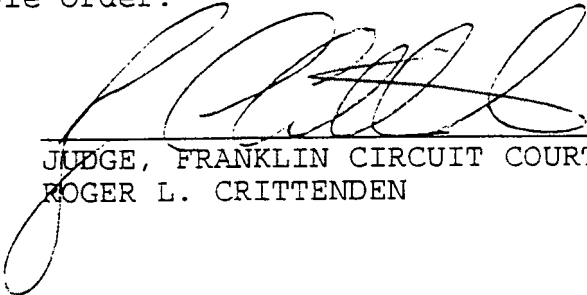
Plaintiffs' evidence that they are currently serving customers in the area of the proposed pipeline and that they could in the future lose such customers if the Jacks Creek Pipeline is constructed does not constitute evidence of unnecessary multiplication of physical facilities. Nor does the Court find Plaintiffs' discussion of economic protectionism relevant to this matter. This jurisdiction had long held that utilities are not entitled to protection from competition. Kentucky Utilities Co. v.

Public Service Commission, Ky., 390 S.W.2d 168, 175 (1964). The Orders herein therefore are not unlawful, arbitrary or unreasonable simply because the Commission did not find that the proposed pipeline constitutes unlawful duplication.

Therefore, this Court rejects the challenges raised by the Plaintiffs and affirms the April 17, 1992, and May 26, 1992, Orders of the Kentucky Public Service Commission.

SO ORDERED this 9th day of March, 1993.

This is a final and appealable order.



JUDGE, FRANKLIN CIRCUIT COURT
ROGER L. CRITTENDEN