

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

SPEARS WATER COMPANY)	
)	
COMPLAINANT)	
)	
v.)	CASE NO. 96-449
)	
KENTUCKY-AMERICAN WATER COMPANY)	
)	
DEFENDANT)	

O R D E R

On September 12, 1996, Spears Water Company, Inc. ("Spears") filed a Complaint with the Commission naming Kentucky-American Water Company ("Kentucky-American") as the Defendant. According to the Complaint, Kentucky-American was in the process of installing a meter to serve the property of John Ragland, 3533 Walnut Hill Road, located in an area which had been served by Spears for over 20 years. Spears believed this to be duplication of service and a serious detriment to its well-being. Spears therefore asked the Commission to prohibit Kentucky-American from serving Spears' existing customers and from soliciting any of Spears' existing customers for water service. Spears also requested that Kentucky-American be instructed to refrain from providing service to any of Spears' existing customers until the matter was resolved.

Kentucky-American responded to Spears' Complaint on September 25, 1996. According to Kentucky-American, Spears failed to state a claim upon which relief could

be granted. Kentucky-American also contended that the question raised by the Complaint was res judicata. In support of its position, Kentucky-American stated the following: Mr. Ragland applied to Kentucky-American for service at 3533 Walnut Hill Road and executed a service contract with Kentucky-American. Kentucky-American in turn provided service to Mr. Ragland through its existing Jack's Creek Pipeline. Kentucky-American received a Certificate of Public Convenience and Necessity from the Commission in Case No. 91-359¹ for the purpose of constructing this pipeline. Spears appealed the Commission's decision in that proceeding to the Franklin Circuit Court, arguing duplication of service and wasteful duplication. The Franklin Circuit Court upheld the Commission's decision. Kentucky-American furthermore denied that by providing service to anyone in the vicinity of the Jack's Creek Pipeline it would seriously affect Spears.

On February 18, 1997, the Commission issued an Order which found:

1. Kentucky-American had been granted a Certificate of Public Convenience and Necessity to construct the Jack's Creek Pipeline by Order of the Commission in Case No. 91-359.

¹ Case No. 91-359, Application of Kentucky-American Water Company For A Certificate Of Public Convenience And Necessity Authorizing The Construction Of Approximately 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". Final Order issued April 17, 1992, modified May 26, 1992.

2. Spears appealed the Commission's decision in Case No. 91-359 to the Franklin Circuit Court in Civil Action No. 92-CI-00851, wherein the Commission's decision was affirmed.²

3. As noted at page four of the Commission's Order of April 17, 1992, in Case No. 91-359, pursuant to KRS Chapter 278 neither Spears nor Kentucky-American have defined service territories and the Commission is without any statutory authority to in effect create such defined service territories, which is what it would be doing if it prohibited Kentucky-American from providing service to individuals living along its Jack's Creek Pipeline.

4. In Civil Action No. 92-CI-00851, the Franklin Circuit Court in its Opinion at page seven, citing Kentucky Utilities Co. v. Public Service Commission, Ky., 390 S.W.2d 168, 175 (1964), noted in response to the plaintiff's discussion of economic protectionism that "This jurisdiction has long held that utilities are not entitled to protection from competition." The Commission in its Order of February 18, 1997, went on to state that it therefore did not have the authority to reverse the findings of the Franklin Circuit Court on this issue by granting Spears that very protection.

² Civil Action No. 92-CI-00851, Spears Water Company, Inc., Jessamine County Water District No. 1, Lexington-South Elkhorn Water District, and City of Nicholasville vs. Kentucky Public Service Commission and Kentucky-American Water Company. Final Order entered March 9, 1993.

5. 807 KAR 5:006, Section 14, defines under what conditions a utility may refuse or terminate service to a customer. If none of these conditions applied to Mr. Ragland, or any other person residing along the Jack's Creek Pipeline, Kentucky-American does not have the right to refuse service if requested. The Order of February 18, 1997, then called Kentucky-American's attention to page five of the Commission's Order of May 26, 1992, in Case No. 91-359, wherein reference was made to a statement by Kentucky-American that it would not solicit any existing customers of Spears.

Based on these findings, the Commission denied Spears' Motion for Cease and Desist Order, denied Spears' request for a hearing, and dismissed Spears' complaint against Kentucky-American.

On March 13, 1997, Spears filed a Petition for Rehearing. According to Spears, the Commission in its Order of February 18 said that water utilities do not have the right to be free from competition, and that the Commission has no authority to interfere with the competitive activities of water companies. This was in fact not an accurate interpretation of the Commission's Order, which merely applied the determination already made by the Commission in Case No. 91-359 regarding the Commission's lack of authority to create defined service territories, and followed the opinion of the Franklin Circuit Court in Civil Action No. 92-CI-00851 which held that utilities are not entitled to protection from competition.

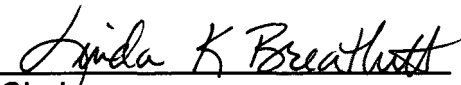
Spears' position is that based on past Commission decisions it is inconsistent for the Commission to take the position in this proceeding that competition is the only matter which has any significance and that said competition is totally uninhibited and unregulated. However, this is not actually the position taken by the Commission in its Order of February 18, 1997. Rather, the Commission's position in this matter is that the Jack's Creek Pipeline was lawfully constructed and that Kentucky-American does not have the right to refuse service if requested. In fact, the matter at issue in this proceeding is very fact specific. The Commission issued a Certificate of Public Convenience and Necessity to Kentucky-American to construct the Jack's Creek Pipeline. Spears appealed the Commission's decision to Franklin Circuit Court, arguing at that time that its construction would result in duplication of service and wasteful duplication. The Franklin Circuit Court upheld the Commission's decision. The matter being res judicata, the Commission dismissed Spears' complaint. Spears is in essence seeking to relitigate the whole Jack's Creek Pipeline issue by asking the Commission to prohibit Kentucky-American from providing service from it to anyone requesting it. Kentucky-American constructed the Jack's Creek Pipeline with the Commission's approval, upheld by the Franklin Circuit Court. There are no service territories for privately owned water utilities and Kentucky-American does not have the right to refuse service if it is requested, subject to the provisions of 807 KAR 5:006, Section 14. Due to the fact that the matters at issue in this proceeding were already addressed and


decided in Case No. 91-359 and Civil Action No. 92-CI-00851, the Commission has no reason or right to revisit those matters in this proceeding.³

IT IS THEREFORE ORDERED that Spears' request for rehearing is denied.

Done at Frankfort, Kentucky, this 2nd day of April, 1997.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:


Executive Director

³ Regarding Spears' request for a hearing per se, pursuant to KRS 278.260(2), the Commission "may dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary in the public interest or for the protection of substantial rights." Again, the matters at issue in this proceeding having already been litigated both before the Commission and in Franklin Circuit Court, a hearing at this time would neither be in the public interest nor for the protection of substantial rights.